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ABSTRACT

Featured in the issue is an analysis of the Supreme Court's decision on O'Connor v. Donaldson, and provided are updated summaries of 104 cases previously reported in the publication. Reviewed are cases on the following topic areas: architectural barriers, classification, commitment, custody, education, employment, guardianship, protection from harm, sterilization, treatment, voting, and zoning. (CL)

MENTAL RETARDATION and the LAW

A Report on Status of Current Court Cases

September 1975

This comprehensive issue of "Mental Retardation and the Law," which features a discussion of the Supreme Court's historic decision in O'Connor v. Donaldson, was prepared to summarize and update all cases reported previously and to provide for requests for earlier issues no longer available.

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Office of the Assistant Secretary for Human Development
President's Committee on Mental Retardation
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I. FEATURE

THE SUPREME COURT DECISION IN O'CONNOR v. DONALDSON, ___ U.S. ___ (43 U.S.L.W. 4929, June 26, 1975).

While the Donaldson case involved an allegedly mentally ill plaintiff, it is reported here because of its implications for the rights of the retarded.

On June 26, 1975 the U.S. Supreme Court handed down its historic decision in O'Connor v. Donaldson . As reported earlier, the plaintiff had been civilly committed to the Florida State Hospital at Chattahootchee in January, 1955, diagnosed as "paranoid schizophrenic." He remained at that hospital for the next 14-1/2 years, during which time he received little or no psychiatric treatment. Donaldson contended that he had a constitutional right either to be treated or to be released from the state hospital. He filed a damage action under 42 U.S.C. Sec. 1983 against hospital and state mental health officials who allegedly deprived him of his constitutional rights. A federal jury returned a verdict of $28,500 in compensatory damages and $10,000 in punitive damages against two of the defendants, one of whom was Donaldson's attending physician and the other of whom was the clinical director of the hospital during part of the period of Donaldson's confinement.

Although the Donaldson case was upheld below on the theory that involuntarily confined mental patients have a right to treatment or release, the Supreme Court found that it was not necessary to decide the right to treatment issue in order to affirm the decision. Instead, it focused on the constitutional right to liberty and issued a narrow opinion.

The narrow legal holding of Donaldson is that "a state cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends."

Writing for the unanimous Court, Justice Stewart rejected the notion that mental patients might be exiled by a community which finds their presence upsetting: "May the state fence in the harmlessly mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the state, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of...physical liberty."

The Court further held that "mental illness alone" cannot serve as a basis for "simple custodial confinement." May someone be confined

because he or she would be better off in an institution? "That the state has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution."

Expressly left undecided were two important further issues:

1. Whether the state may compulsorily confine a non-dangerous mentally handicapped individual if it provides treatment; and

2. Whether a civilly committed mentally handicapped person who is dangerous to himself or others has a constitutional right to treatment.

While the Donaldson case was decided narrowly, the opinion is rich in ancillary holdings. The Court noted that adequacy of treatment is a justiciable question; that states are under a continuing obligation to review periodically the justifications for individual commitments; and that mental-health personnel can be held personally liable for bad faith violations of a patient's constitutional right to liberty.

Two interpretations of Donaldson have appeared in the press which are inaccurate. First, some reports intimate that the decision is a signal to lower courts not to enforce the right to treatment. Although the issue as framed below was Donaldson's right to treatment or to release, the Supreme Court chose to focus on the liberty issue and did not make any holding on the right to treatment issue. While it did not specifically endorse the right to treatment (possibly because such an endorsement might have divided the Court and made unanimity impossible), the opinion did not express any disapproval of the right to treatment. In a separate concurrence, Chief Justice Burger did indicate an unwillingness to recognize a right to treatment but no other Justice joined him, and the implications of his separate concurrence are thus unclear. Moreover, only four days after the Donaldson decision the Supreme Court denied certiorari in the Burnham right to treatment case from Georgia. By declining to hear and decide the right to treatment issue directly, the Court left in effect a number of lower court decisions recognizing a constitutional right to treatment, including the Wyatt decision in the Fifth Circuit.

Second, some newspapers have reported that the Court held that mental patients cannot recover damages from their physicians. The Supreme Court did in fact reverse the lower court's award of damages against Dr. O'Connor and remanded the issue for rehearing. But the remand is specifically to determine whether at the time he unlawfully confined Kenneth Donaldson, Dr. O'Connor knew -- or reasonably could have known -- that he was violating Donaldson's right to liberty. Now that the right to liberty has been clarified and mental health professionals have been put

on notice, there is no doubt that they will be liable for damages in future cases if they illegally deprive a mental patient of his freedom under state commitment laws.

With regard to its implications for the retarded, Donaldson is noteworthy as the first Supreme Court opinion in recent times to discuss the rights of a civilly committed person who has not been accused or convicted of a crime. A unanimous Court has now expressed concern for the plight of the mentally handicapped in our country and has recognized that the mentally handicapped are citizens with full constitutional rights, like the rest of us. This expression of interest by the U.S. Supreme Court, and the fact that the decision was unanimous, will give much encouragement to lower federal and state courts which are asked to review other legal claims on behalf of the mentally handicapped.

In terms of more specific relevance, however, the Donaldson decision does not directly address issues of main concern to the retarded and their advocates. Language in the Donaldson decision could certainly be relied upon by retarded persons who were not dangerous and were able to function in society but whom the state wished to commit. But whereas Donaldson was confined over his objections, many retarded persons enter institutions in the hope of receiving meaningful habilitation and training. Thus, the main focus of concern is not with liberty per se, but (1) with whether the Constitution provides some basic right to habilitation and training (an issue expressly left undecided in the Donaldson opinion) and (2) if so, whether the retarded have a right to receive such habilitation and training in more normal, community-based facilities, rather than in remote institutions. These issues have been and continue to be before the lower courts in such landmark cases as Wyatt v. Stickney, Welsch v. Likins, Dixon v. Weinberger, the "Willowbrook" case (see the feature analysis in the June, 1975 issue of "Mental Retardation and the Law,") and the many right to education cases modeled on PARC and Mills.

II. CASES

A. ARCHITECTURAL BARRIERS

District of Columbia: Urban League v. WMATA, Civil No. 776-72 (U.S. D. Ct., D.C.), decided October 9, 1973.

The plaintiffs in this class action suit included, among others, the Washington Urban League, the Paralyzed Veterans of America, and the National Paraplegic Foundation.

The defendant was the Washington Area Metropolitan Transit Authority (WMATA) which is in the process of constructing a subway system for the Washington, D.C. metropolitan area.

The plaintiffs claimed that WMATA was constructing the subway system without taking into account the needs of physically handicapped citizens who might want to use the system. In particular, the plaintiffs were concerned that there would not be elevators to the subway station for use by people who could not use stairs because they were confined to wheelchairs due to physical handicaps. Plaintiffs based their legal claims on 42 USC 4151 (as amended by PL 91-205) which requires that any public facility built with Federal funds (including the subway) must be accessible to persons who are physically handicapped, as well as various constitutional theories.

The plaintiffs sought the following relief:

1. A declaratory judgment that WMATA was in violation of 42 USC Sec. 4151;

2. A preliminary injunction to prevent further construction which would make the installation of elevators more difficult; and to prevent expenditure of funds for the design or construction of further stations until provisions were made for handicapped persons in currently constructed stations;

3. A permanent injunction preventing the defendant from constructing any further stations until the court was assured of WMATA's compliance with the law and its agreement to install elevator systems.

The motion for a preliminary injunction was denied, but on October 8, 1972, the District Court entered an order declaring that 42 USC 4151 applied to the facts of this case. Rather than granting immediate relief, the court retained jurisdiction until October 8, 1973, at which time WMATA was to report back to the court as to what steps had been taken to comply with the law.

On June 29, 1973, the court entered an order granting partial summary judgment declaring that defendants were under a legal obligation to design the subway system for use by physically handicapped persons. A mandatory injunction was handed down on October 9, 1973, enjoining WMATA from commercially operating the subway system until it was made accessible to physically handicapped persons.

Maryland: Disabled in Action of Baltimore, et al. v. Hughes, et al., Civil Action No. 74-1069-HM (U.S. D. Ct., Md.), filed October 2, 1974.

This class action was filed on behalf of all handicapped and elderly persons who were being denied access to mass transit vehicles in the Baltimore metropolitan area. Plaintiffs sought to enjoin the Mass

Transit Administration and the Maryland Department of Transportation from purchasing any new buses unless they were made accessible to the handicapped and the elderly.

Plaintiffs withdrew their suit following agreement on a memorandum of understanding which provided:

1. Two hundred and five buses which were being purchased would be designed according to specifications which would make them accessible to the handicapped and the elderly;

2. The transportation officials would undertake a program which would reserve three seats behind the driver exclusively for use by the handicapped and the elderly;

3. Within thirty days the transportation officials would apply for a grant to purchase ten buses equipped to meet the needs of persons who ambulate by means of a wheelchair;

4. The U.S. Department of Transportation, one of the defendants in the action, agreed to propose rules and regulations within one year to assure the availability of mass transportation to handicapped and elderly persons.

Ohio: Friedman v. County of Cuyahoga, Case No. 895961 (Court of Common Pleas, Cuyahoga County, Ohio), consent decree entered November 15, 1972.

Plaintiffs in this class action which challenged the constitutionality of architectural barriers to the physically handicapped in public buildings were Jeffery Friedman, a law student (now a lawyer) in Cleveland, Ohio, and the class of all physically handicapped persons in Cuyahoga County.

The defendants were officials of Cuyahoga County, Ohio.

The suit was brought after Friedman tried unsuccessfully to enter various county buildings, including the County Administrative building and the County Courthouse. Friedman, confined to a wheelchair due to an automobile accident, was unable to enter most of these buildings because they were designed in such a way as to be inaccessible to persons in wheelchairs.

Plaintiffs sought an injunction ordering the defendants to alter the buildings to make them accessible to physically handicapped persons.

On November 15, 1972, Judge John T. Patton entered a consent decree, whereby defendants agreed to install ramps, a bell or signalling device, or other appropriate means to assure ingress and egress by physically handicapped persons to certain public buildings.

B. CLASSIFICATION

California: Larry P. v. Riles, No. C-71-2270 (U.S. D. Ct., N.D., Calif.), preliminary injunction order, 343 F. Supp. 1306 (1972), affirmed, 502 F.2d 963 (9th Cir. 1974); supplementary order, December 13, 1974.

This class action was filed November 18, 1971, on behalf of several named plaintiffs and all black children in California, who were wrongly placed and retained in classes for the mentally retarded. All of the named plaintiffs attended elementary schools in the San Francisco Unified School District. The defendants were Wilson Riles, Superintendent of Public Education of California, Members of the State Board of Education, the Superintendent of Schools for the San Francisco Unified School District, and Members of the Board of Education of the San Francisco Unified School District.

The complaint alleged that the plaintiffs and the class they represented had been wrongly placed in classes for the mentally retarded as a result of a testing procedure which failed to recognize their unfamiliarity with the white middle-class culture and which ignored the learning experiences they had had in their homes. This improper placement was further alleged to result in stigma, and a life sentence of illiteracy and public dependency. The complaint further alleged that the placement procedure violated the Civil Rights Act of 1871 and the right to equal protection, guaranteed by the California Constitution and the Fourteenth Amendment of the U.S. Constitution, which prohibits discrimination based on race or color.

The plaintiffs requested the Court to grant the following relief:

1. Enjoin defendants from performing psychological evaluation or assessment of plaintiffs and other black children by using group or individual ability or intelligence tests which do not properly account for the cultural background and experience of the children to whom such tests are administered;

2. Enjoin defendants from placing plaintiffs and other black children in classes for the mentally retarded on the basis of results of such culturally discriminatory tests and testing procedures;

3. Enjoin defendants from retaining plaintiffs and other black children now enrolled in classes for the mentally retarded unless such children are immediately and then annually re-evaluated and retested by means which properly account for the cultural background and experience of the children;

4. Enjoin defendants from refusing to place plaintiffs into regular classrooms with children of comparable age, from

refusing to provide them with intensive and supplemental individual training in verbal skills, mathematics, and other areas of the school curricula in order to bring plaintiffs and those similarly situated to the level of achievement of their peers as rapidly as possible;

5. Enjoin defendants from refusing to remove from the school records of these children any and all indications that they were or are mentally retarded or in a class for the mentally retarded, and require defendants to insure that individual children not be identified by results of individual or group I.Q. tests and that such results not be placed in children's school records or reported to classroom teachers or to other faculty or administrators on the school sites;

6. Require defendants to take the necessary action to correct any discriminatory variance and to bring the distribution of black children in classes for the mentally retarded into close proximity with the distribution of blacks in the total population of the school districts;

7. Require defendants to recruit and employ a sufficient number of black and other minority psychologists and psychometrists in local school districts, on the admission and planning committees of such districts, and as consultants to such districts. Require defendants to make concerted efforts to insure that psychological assessment of black children be conducted and interpreted by persons adequately prepared to consider the cultural background of the child, preferably a person of similar ethnic background as the child being evaluated. Require the state Department of Education in selecting and authorizing tests to be administered to school children throughout the state, to consider the extent to which the testing company has utilized personnel with minority ethnic background and experience in the development of a culturally relevant test;

8. Declare pursuant to the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the current assignment of plaintiffs and other black students to California mentally retarded classes resulting in excessive segregation of such children into these classes is unlawful and unconstitutional and may not be justified by administration of the currently available I.Q. tests which fail to properly account for the cultural background and experience of black children.

On June 20, 1972, the Court granted a preliminary injunction on behalf of all black school children in classes for the educable retarded in San

Francisco. The Court ruled that where the use of I.Q. testing to place students in classes for the "educable mentally retarded" results in a disproportionate share of black students in such classes, and where the I.Q. test is the primary determinate of placement, the burden is on the school officials to prove that the test is a valid measure of intellectual ability and does not (because of biases built into the test and the testing situation) discriminate on the basis of race. The court articulated three reasons for shifting this burden to the defendants (where it normally would not be): (1) a distrust of any classification which harms black people as an identifiable group; (2) a positive duty imposed on school officials to avoid racial imbalance; and (3) the theory that since ability to learn is randomly spread out among the population, any imbalance raises a presumption of discrimination which the school officials must rebut.

On August 16, 1974, the Ninth Circuit affirmed the preliminary injunction of June 20, 1972, in a brief per curiam opinion.

On December 13, 1974, the District Court:

1. Granted plaintiffs' motion to modify the class to include all California black school children who have been or may in the future be classified as mentally retarded based on I.Q. tests;

2. Restrained the defendants from performing psychological evaluations by the use of, or placing black children in schools for the mentally retarded on the basis of, tests which do not properly account for the cultural background and experiences of the children;

3. Ordered defendants to furnish all school districts with copies of the order within 20 days;

4. Denied plaintiffs' motion for injunctive relief restraining defendants from placing black children in classes for the educable mentally retarded (EMR) in a proportion which exceeds specific quotas;

5. Denied plaintiffs' motion for contempt against the school district;

6. Ruled that if in 120 days the percentage of black children in an EMR class in any school district exceeds the percentage of black children in the total enrollment in that district, and if an I.Q. test is used in any manner for placement in EMR classes in that district, plaintiffs may require defendants to demonstrate affirmatively that the I.Q. test used properly accounts for the cultural background and experiences of black children;

7. Ruled that within 150 days defendants shall serve on plaintiffs a table for each school district indicating the percentage of black children in the total enrollment and the percentage of black children in EMR classes on the 120th day after the issuance of the court order. Further required defendants to serve at the same time a list of all I.Q. tests used for EMR placement in any manner for each district;

8. Ruled that use of any test which fails to comply with the injunction shall be viewed as grounds for contempt.

Subsequent to the order, the California State Board of Education disapproved its list of verbal and nonverbal standardized individual intelligence tests for the placement of children into classes for the educable mentally retarded. Thus, the state discontinued using the tests for such placement for all children, even though the court order applied only to black children.

Louisiana: Lebanks, et al. v. Spears, et al., consent decree, 60 F.R.D. 135 (U.S. D. Ct., E.D. La. 1973).

This class action was brought by eight black children who were citizens of the Parish of Orleans who had been classified as mentally retarded, and on behalf of all citizens of the Parish of Orleans who were similarly situated. The defendants were the President of the Orleans Parish School Board; Members of the Orleans Parish School Board; the Superintendent for the Orleans Parish School Board; the Head of the Special Education Department of the Orleans Parish School; the Louisiana Department of Hospitals; and the Louisiana Department of Education.

The complaint alleged that the determinations made by defendants that the plaintiffs and members of their class were mentally retarded were based on neither valid reasons nor ascertainable standards and were made pursuant to tests and procedures that were biased against blacks, thus violating the plaintiffs' right to education as included in the due process and equal protection clauses of the Fourteenth Amendment. The defendants were also alleged to have violated the plaintiffs' right to equal protection by failing to provide education to the plaintiffs while providing an education to children of higher intelligence; by failing to provide plaintiffs with an education tailored to their needs while providing same to other mentally retarded children; and by failing to provide special education equally to blacks and whites. The complaint also cited violations of the plaintiffs' right to due process in that the defendants had failed to accord plaintiffs hearings to contest defendants' decisions to classify them as mentally retarded and to exclude them from educational programs. The complaint further alleged that the plaintiffs had suffered damages from the refusal by the defendants to give the plaintiffs an education.

The plaintiffs sought the following relief:

1. That the court award each plaintiff $20,000 as damages;

2. That the court enter declaratory judgment and preliminary and permanent injunctions enjoining the defendants from:

   a. Classifying the plaintiffs and members of their class as mentally retarded pursuant to procedures and standards that are arbitrary, capricious, and biased;

   b. Denying the plaintiffs and members of their class the opportunity to receive a special education geared to their special needs;

   c. Denying the plaintiffs and members of their class the opportunity to receive any education;

   d. Discriminating, in the allocation of opportunities for special education, between plaintiffs, and other black retarded children, and white retarded children;

   e. Classifying plaintiffs and members of their class as retarded without first affording a full, fair, and adequate hearing which meets the requirements of due process of law;

   f. Excluding plaintiffs and members of their class from the public schools without first affording a full, fair, and adequate hearing which meets the requirements of due process of law;

   g. Excluding plaintiffs and members of their class from special education classes without first affording a full, fair, and adequate hearing which meets the requirements of due process of law.

On April 24, 1973, the parties signed a consent agreement which was to go into effect May 31, 1973. The consent decree provides that public education programs suited to the needs of mentally retarded children aged five to twenty-one years shall be accorded them. "With respect to persons over twenty-one years who were suspected of being or were mentally retarded and were without education as children," the agreement mandates their placement in programs "appropriate to their age."

A detailed scheme of evaluations and educational plans, hearings and determinations of appropriate programs of education and training is set forth in the agreement. A timetable for implementation and reporting, including proposed modification of the order, has been included.

Massachusetts: Stewart, et al. v. Philips, et al., Civil Action No. 70-1199-F (U.S. D. Ct., Mass.), filed September 14, 1970.

This suit, which has been certified as a class action, attacks the classification methods employed by the Boston school system for placing mentally retarded children in special education classes. The seven named plaintiffs, found to be not retarded by independent psychological evaluations, were all placed in retarded classes on the basis of a single IQ test. The suit alleges that irreparable harm has been caused by the stigma and by the nature of the instruction given. The remedies sought are damages and the establishment of a Commission on Individual Education Needs. Made up of public organizations, private organizations and parents, the commission would oversee a proposed testing procedure detailed in the complaint. All children presently in special education classes would be retested.

A motion to dismiss by defendants was denied. The primary issue in contest is whether new regulations adopted by the Boston school system are being complied with. Among other things the regulations provide that: (1) all children in special classes for the mentally retarded must receive a medical examination; (2) prior to the placement of a child in a class for the mentally retarded, he must receive a thorough medical and psychological examination and consultations must be held with such child's parents; and (3) a child labeled mentally retarded and scheduled for placement in a special class has a right to a due process hearing to contest placement and to an independent review by an outside psychiatrist.

C. COMMITMENT

District of Columbia: Poe v. Weinberger, No. 74-1800 (U.S. D. Ct., D.C.), filed December 10, 1974.

Plaintiffs challenge statutory procedures which permit juveniles to be committed by parents or guardians to mental institutions as "voluntary" patients and which deny the juveniles procedural safeguards provided for "involuntary" patients.

District of Columbia: United States v. Michael K. Shorter, Crim. No. 67724-23 (Superior Ct., D.C.). Decided November 13, 1974.

Defendant in this case is a mentally retarded man who was acquitted of taking indecent liberties with a minor child and enticing a minor child based on a finding that the offenses with which he was charged were a product of his mental defect.

The govermment made a motion for defendant's commitment pursuant to 24 D.C. Code Section 301, which provides for commitment of persons found not guilty by reason of insanity to hospitals for the mentally ill.

The court denied the government's motion, finding inter alia: (1) that 24 D.C. Code Section 301 is not applicable to individuals acquitted because of a mental defect; (2) that treatment for the mentally retarded differs materially from treatment for the mentally ill; (3) that facilities designed for the treatment of the mentally ill are not generally suitable for the treatment of the mentally retarded; and (4) that commitment of defendant to a hospital for the mentally ill would be "inappropriate, unwarranted, futile and would amount to labor in vain."

Concluding that no statute exists in the District of Columbia that gives jurisdiction or direction to a court when a defendant is acquitted by reason of a mental defect, the court ordered the defendant released from the court's jurisdiction.

The government filed a notice of appeal in the District of Columbia Court of Appeals (Case No. 9076).

Indiana: Jackson v. Indiana, 406 U.S. 715 (1972).

Petitioner in this case was a 27-year-old deaf mute with a mental age of three to four years. Four years before he was accused of taking $9 in two separate larcenies. He denied the charges, and was never brought to trial because he was found to be incompetent and unable to assist in his own defense. For almost three years, he was confined in a state mental institution. His compulsory hospitalization, which because of the nature of his condition would probably have been for life, was accomplished under standards less rigorous than the ordinary civil commitment in Indiana. This occurred simply because of his incompetency to stand trial on the charges filed against him.

The petitioner contended that his confinement under these conditions deprived him of the equal protection of the laws, of his right to bail, and of his right to a speedy trial.

The Supreme Court held, inter alia:

> "...that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

The Court specifically held that subjecting petitioner Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, deprived him of equal protection of the laws under the Fourteenth Amendment. The Court held further that Indiana's indefinite commitment of a criminal defendant solely because of his incompetence to stand trial violates the Fourteenth Amendment's guarantee of due process.

The Court's opinion is especially notable for its call for closer scrutiny of the commitment process. The opinion notes that the substantive limitations on the exercise of the commitment power and procedures for involving it vary drastically among the states. The Court then goes on to state:

> "The particular fashion in which the power is exercised--for instance, through various forms of civil commitment, defective delinquency laws, sexual psychopath laws, commitment of persons acquitted by reason of insanity--reflects different combinations of distinct bases for commitment sought to be vindicated. The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."

Michigan: Jobes, et. al. v. Michigan Department of Mental Health.

Reported under Treatment section.

Pennsylvania: Bartley, et al. v. Kremens, et al., Civil Action No. 72-272 (U.S. D. Ct., E.D., Pa.). Decided July 24, 1975.

Named plaintiffs in this case are individuals who were allegedly involuntarily committed to Pennsylvania mental health facilities pursuant to statutory provisions applicable to citizens 18 years old or younger. They sue on behalf of all citizens 18 years old or younger who may be committed to facilities for the mentally ill or mentally retarded under the challenged procedures.

Defendants are various state officials responsible for the supervision of Pennsylvania mental health facilites.

Friend of the court briefs in support of plaintiffs' position have been filed by the United States, the Youth Law Center, the Pennsylvania Association for Retarded Children, the National Center for Law and the Handicapped and the Pennsylvania ACLU.

Plaintiffs challenge the constitutionality of statutory provisions which permit commitment of juveniles to institutions for the mentally ill and

mentally retarded simply upon application of parents or guardians, regardless of the wishes of the juvenile and without a hearing or counsel for the juvenile. Plaintiffs also claim that for the purposes of commitment they may not be afforded fewer protections than adults.

On July 24, 1975, a three-judge panel of the United States District Court declared the challenged commitment statutes unconstitutional on their face and as applied to plaintiffs and others of their class.

The court held that due process requirements apply to civil commitment proceedings involving minors. Specifically, the court ruled that plaintiffs and others of their class are entitled to:

1. a probable cause hearing within seventy-two hours from the date of their initial detention;

2. a post-commitment hearing within two weeks from the date of their initial detention;

3. written notice, including the date, time, and place of the hearing, and a statement of the grounds for the proposed commitment;

4. counsel at all significant stages of the commitment process and if indigent the right to appointment of free counsel;

5. the right to be present at all hearings concerning their proposed commitment;

6. A finding by clear and convincing proof that they are in need of institutionalization; and

7. the rights to confront and to cross-examine witnesses against them, to offer evidence in their own behalf, and to offer testimony of witnesses.

Recognizing that "parents, as well as guardians ad litem or persons standing in loco parentis, may at times be acting against the interests of their children," the court also held:

> "In the absence of evidence that the child's interests have been fully considered, parents may not effectively waive personal constitutional rights of their children."

West Virginia: State ex rel. Miller v. Jenkins, No. 13340 (Supreme Ct. of Appeals, W.Va. at Charleston). Decided March 19, 1974.

Petitioners in this case were mentally retarded persons committed to West Virginia institutions after having been charged with a crime and

found incompetent to stand trial. They sought a writ of habeas corpus to secure their release from the various state institutions. Defendants were the directors of the institutions in which the petitioners were confined. Under state law, petitioners were required to remain committed until they were "well enough" to stand trial. However, since they were all mentally retarded, they potentially faced life sentences in state institutions, although they had never been convicted of a crime. Petitioners contended that:

--They were denied the protections of procedural due process of law in the proceedings that led to their commitment in that they were not given notice, an opportunity to be heard, the right to confront witnesses against them, nor were they provided with counsel.

--They were denied equal protection of the laws in that procedural safeguards were present for those civilly committed but not those committed to the same institutions after criminal charges had been filed.

--They were denied equal protection of the laws in that under West Virginia standards it was easier for a person who was incompetent to stand trial to be committed than it was for other persons to be civilly committed, and that it was more difficult for persons incompetent to stand trial to gain their release than for other patients who were civilly committed to the same institutions.

--They were further denied equal protection in that they were denied access to many of the habilitative programs available to other retarded persons at the state hospitals in which they were confined.

On March 19, 1974, the Supreme Court of Appeals granted the petition for habeas corpus. The court ruled, inter alia:

That the state must determine whether a person is competent to stand trial within 60 days of commitment.

That a person may not be confined for more than six months even if he has not become competent within that period.

That a person may not be committed to a mental instituion "attendant to a criminal prosecution" unless it has been demonstrated by "clear, cogent, and convincing" evidence that he is "dangerous to himself or others."

That if a person is "so severely retarded that he is unable to stand trial...the state must either bring a civil commitment action against [him] or discharge him."

In this case the court ordered the petitioners released within sixty days to enable the state to institute civil commitment proceedings if it so desired.

Wisconsin: State ex rel. Matalik v. Schubert, 47 Wis.2d 315, 204 N.W.2d 13 (Wis. Supreme Ct. 1973).

This case involved an allegedly mentally ill person but has direct and important implications for the retarded. Amil Matalik, petitioner in this state habeas corpus case, was found incompetent to stand trial on the charge of contributing to the delinquency of a minor, and was committed to a Wisconsin state mental hospital. At the hearing where his incompetency was determined, petitioner objected to the diagnosis in the psychiatric report, but his attorney waived his right to challenge. There was thus no hearing on the issue of whether the diagnosis was a valid one. After commitment, petitioner filed for a writ of habeas corpus, raising three issues:

1. Denying petitioner a right to a jury trial on the issue of competency to stand trial deprived him of equal protection because persons who are going to be civilly committed have that right.

2. The procedure whereby he was declared incompetent violated the standards of procedural due process of law, because under the statute counsel for the defendant (who really acts as a guardian ad litem), can waive the defendant's right to challenge the psychiatric report, even over the defendant's protest.

3. If petitioner is to be confined for a period longer than the "reasonable period" prescribed in Jackson v. Indiana (see above), he is entitled to a hearing under the Wisconsin Civil Commitment provisions.

After considering these issues, the court granted habeas corpus to the petitioner and held as follows:

1. Denial of trial by jury did not deprive petitioner of equal protection. Since under Jackson, the petitioner could only be confined "temporarily," the court analogized the incompetency commitment procedure to the "emergency" civil commitment procedures which require no jury trial.

2. The petitioner was deprived of due process because under the Wisconsin statute he did not have the right to challenge the report of the state psychiatrist and have a hearing on its validity. Among the procedural rights a person must have at such a hearing are: the right to counsel; the right of confrontation; the right to introduce evidence challenging the psychiatric report; and the right to timely and adequate notice. Further, the court ruled that the quantum of proof for a determination of incompetency is "beyond a reasonable doubt."

3. Under Jackson v. Indiana, a person who is involuntarily committed can be confined for no more than six months. At this point he must either be released or the state must seek civil commitment through the statutory procedures for civil commitment.

Wisconsin: State ex rel. Haskins v. County Court of Dodge County, 62 Wis.2d 250, 214 N.W.2d 575 (Supreme Ct., Wis. 1974).

This was a class action for a declaratory judgment under the original jurisdiction of the Wisconsin Supreme Court pursuant to the decisions in Jackson v. Indiana and State ex rel. Matalik v. Schubert (see above) seeking a determination of the procedures to be followed when a person is entitled to release under those two decisions.

The plaintiffs were a class of individuals who were committed to mental institutions subsequent to a determination that they were incompetent to stand trial; who had been committed for periods exceeding six months; and who the Department of Health and Social Services had determined would not become competent in the foreseeable future. The respondents were (1) all of the county courts which would arguably have jurisdiction to civilly commit the plaintiffs; (2) all courts in the state which had committed the plaintiffs as incompetent to stand trial; and (3) the Attorney General of the State of Wisconsin.

The plaintiffs argued that under Jackson and Matalik the court should adopt the following procedures for those adjudged incompetent to stand trial:

1. Within six months after commitment, the Department of Health and Social Services should evaluate the person adjudged incompetent to stand trial and make one of the following determinations:

   a. The person adjudged incompetent to stand trial is now competent to stand trial;

   b. The person adjudged incompetent to stand trial is not likely to become competent to stand trial in the foreseeable future; or

   c. The person adjudged incompetent to stand trial is not now competent but will become competent within the next six months.

2. After this determination is made by the Department, a court hearing must be held, at which the defendant may exercise all of the due process rights, to determine which of the above three statuses is an appropriate one for the defendant. The consequences of this determination would be as follows:

   a. If now competent to stand trial, the person should be tried.

b. If not likely to become competent, then he must either (1) be immediately released; or (2) be civilly committed assuming he is committable under the regular statutes governing civil commitment. If the person committed as incompetent to stand trial is not likely to become competent, then criminal charges should immediately be dropped, for not to do so would violate the right to a speedy trial. (Plaintiffs here sought a court decision on an important issue on which the Jackson court reserved judgment.)

c. If the decision is that the person committed as incompetent to stand trial will become competent within six months, he may be committed for another six-month period but after this extension he must be again evaluated and adjudged either competent or incompetent. He may not be sent back for a third six-month period.

On February 18, 1974, the Wisconsin Supreme Court ruled that the state may confine a person found incompetent to stand trial for 18 months without violating the U.S. Supreme Court decision in Jackson v. Indiana.

According to the court, while the likelihood of regaining competency declines with the length of commitment, there is still a significant, albeit small, probability that persons confined from 12-18 months will become competent. Moreover, under Wisconsin statutory law, persons who are found incompetent to stand trial may be confined no longer than the maximum sentence for the crime charged. The court reasoned that, although this provision might be unconstitutional under Jackson, nevertheless it did reflect the legislative intent to require lengthy commitments of persons incompetent to stand trial. The court held that a rule permitting commitments of 18 months would reflect the intent of the legislature and would not be inconsistent with Jackson.

The Court found further that:

After a person is initially found incompetent to stand trial, he is entitled to hearings every six months on the question of his competency.

The trial court must independently evaluate psychiatric testimony in determing whether a person is competent.

The trial court may not dismiss charges against one who is found unlikely to regain competency in the foreseeable future.

The mere fact that one is charged with a crime, even a violent one, does not automatically satisfy the standard of dangerousness required for civil commitment.

The mere fact that one is confined beyond the time when it appears likely that he will become competent does not necessitate the dismissal of charges on the grounds of a denial of speedy trial.

D. CUSTODY

Georgia: Lewis v. Davis, et al., Civil Action No. D-26437 (Superior Ct., Chatham County, Ga.), decided July 19, 1974.

Plaintiff in this case was a 16-year-old retarded woman with an IQ of 78 who while under foster care of the Department of Family and Children's Services of the state of Georgia became the mother of a child born out of wedlock.

Defendants were officials who obtained temporary custody of the child by virtue of an ex parte order under the Juvenile Code.

Plaintiff filed a petition for habeas corpus seeking custody of the child.

The Department of Family and Children's Services maintained that:

1. Plaintiff was not capable of caring for the child without the supportive services of the Department;

2. If custody of the child were given to the mother, as opposed to the Department, smaller financial resources would be available;

3. Since the child had been placed with the mother, she had full possession, and the best interests of the child would be served by placing formal custody with the Department.

The court found that plaintiff was an attentive mother who was receptive to training given by the Department. In addition, the court found that plaintiff would probably remain in the care of the Department for several years, and that probabilities were good that she would become an adequate mother with continued training and supervision.

The court concluded by holding that the evidence was insufficient to permit the court to deprive the plaintiff of formal legal custody of her child.

Iowa: In the Interest of Joyce McDonald, Melissa McDonald, Children, and the State of Iowa v. David McDonald and Diane McDonald, Civil Action No. 128/55162 (Iowa Supreme Court, October 18, 1972).

In this case, David McDonald, 24, and his wife Diane, 21, were adjudged unfit to care for their four-year-old twins, Melissa and Joyce. The

Iowa Supreme Court ruled that these twin girls should be taken from their parents because the mother's intelligence quotient was so low that she could not give them proper care. In so doing, the Iowa Supreme Court upheld an August, 1970, decision by the Scott County Juvenile Court which separated the parents from their daughters.

A Scott County juvenile probation officer had filed a petition in which it was alleged the relationship should be terminated as the parents were unfit by reasons of conduct found by the juvenile court likely to be detrimental to the physical or mental health or morals of children as defined in Section 232.41(2) and (d) of the Iowa Code, and for the further reason that following an adjudication of dependency, reasonable efforts under the direction of the court had failed to correct the conditions leading to the termination.

After hearing evidentiary testimony, the Juvenile Court found that Mrs. McDonald could not provide the twins "the stimulation in her home that they must have to grow and develop into normal, healthy children." Intelligence tests given the parents by Davenport school officials indicated that the husband had an I.Q. of 74 and the wife had an I.Q. of 47. The twins, who have lived in foster homes since they were about seven months old, were also tested and were found to be not retarded. Lower court testimony by nurses and social workers who had visited the McDonald home before the girls were placed with foster parents indicated that the twins were then "pale" and "unresponsive." These witnesses testified that while Mrs. McDonald could handle the bathing and feeding of her children, they doubted whether she could make decisions on whether they were ill. Witnesses further testified that Mrs. McDonald had a lack of concern about the twins, but that this was not true of the husband. The McDonald's attorney argued that no evidence was presented that the parents were guilty of immoral conduct, intoxication, habitual use of narcotic drugs or other habits that were likely to be detrimental to the children.

The Iowa Supreme Court found that the primary consideration in such a custody hearing is the welfare and best interests of the children, and that the presumption that the best interests of children are served by leaving them with their parents had been rebutted in this case. The eight justices of the Iowa Supreme Court who sat on this case en banc concurred unanimously in the decision, which held that the state "has the duty to see that every child within its borders receives proper care and treatment." The court's opinion made no further comment on what it would consider a proper parent-child relationship or upon the role which the state should assume in measuring the fitness of parents to provide "proper care and treatment."

Iowa: In the Interest of George Franklin Alsager, et al. and the State of Iowa v. Mr. and Mrs. Alsager, Civil Action No. 169/55148 (Supreme Court of Iowa, October 18, 1972).

On the same day as it decided the McDonald case (see above), the Iowa Supreme Court also decided the Alsager case, in which it upheld an earlier ruling by the Cook County juvenile court which took protective custody of the Alsager's five children. The juvenile court held that "while the Alsagers do love their children, neither have the capacity nor training nor willingness to learn to understand the needs of children." The Iowa Supreme Court held "the material facts can be said to be identical (with those of the McDonald case) except to add the finding that the tragic deficiencies of both families in this case appears to have resulted in more harm to the children....We are precluded from attempting to achieve a justice as desired by the unfortunate parents by working a cruel injustice on the children."

E. EDUCATION

Arizona: Eaton, et al. v. Hinton, et al., Civil Action No. 10326 Superior Ct., Ariz.), filed December 10, 1974.

Named plaintiffs in this class action are a six-year-old boy who had been excluded from a public education, his parents, and the Arizona Association for Retarded Children. Plaintiffs sue on their own behalf, and on behalf of all other handicapped school-age Arizona residents who have been excluded from, or otherwise deprived of, access to free public education.

Defendants are members of the Board of Trustees and the Superintendent of the Mohave Valley School District, sued on their own behalf and on behalf of board members and superintendents of all other Arizona public school districts.

Plaintiffs seek injunctive and declaratory relief to obtain free public education.

On the date the complaint was filed, plaintiffs obtained a temporary restraining order returning the six-year-old named plaintiff to school.

The parties are presently engaged in discovery.

California: California Associaton for Retarded Children v. State Board of Education, No. 237277 (Superior Ct., Sacramento County), filed July 27, 1973.

This "right to education"class action was brought by the California Association for Retarded Children, the Exceptional Children's Foundation, and a number of named mentally retarded children, along with

other handicapped children who allege that they have been denied a free public education.

A motion to dismiss by defendants has been denied. The parties are presently engaged in discovery with regard to the number of children in California who are not receiving an education.

A trial date has not yet been set.

California: Case, et al. v. State of California, Civil Action No. 101679 (Superior Ct., Riverside County).

Lori Case is a school-age child who has been definitively diagnosed as autistic and deaf, and who may also be mentally retarded. After unsuccessfully attending a number of schools, both public and private for children with a variety of handicaps, she was enrolled in the multi-handicapped unit at the California School for the Deaf at Riverside, California. As a result of a case conference called to discuss her status and progress in school, it was decided to terminate her placement on the grounds that she was severely mentally retarded, incapable of making educational progress, and required custodial and medical treatment and intensive instruction that could not be provided by the school because of staffing and program limitations.

Plaintiffs argued that the consequences of the denial of education to Lori Case were so catastrophic that, absent a compelling justification, equal protection would be violated. Plaintiffs argued further that because there was no basis for believing that the state legislature intended to give the board of school administrators the right to terminate a student's education under such circumstances, there had been an inappropriate delegation of authority. Plaintiffs asserted that the record showed that Lori Case was educable, and that under the circumstances of the case, there was a denial of procedural due process to have terminated her education without a full due process hearing.

The plaintiffs sought an immediate temporary restraining order and a preliminary and permanent injunction restraining defendants from preventing, prohibiting or in any manner interfering with Lori Case's education at the California School for the Deaf at Riverside.

The case was filed on January 7, 1972, and a temporary restraining order was granted the same day. A preliminary injunction was granted on January 28, 1972.

A factual hearing was held on September 5, 1972. On December 11, 1972, Judge E. Scott Dales issued a Notice of Intended Decision denying plaintiffs relief. The court said that plaintiffs' case was without merit and that a preponderance of the evidence supported a finding for the defendants.

The trial court denied plaintiffs' motion for a new trial. Plaintiffs noticed an appeal.

The Court of Appeals upheld the determination of the trial court that the autistic child, Lori Case, should not be reinstated to the particular program in the school for the deaf. The court did rule, however, that she is entitled to an alternative educational program. Plaintiffs appealed to the California Supreme Court, but their appeal was rejected.

Colorado: Colorado Association for Retarded Children v. The State of Colorado, Civil Action No. C 4620 (U.S. D. Ct., Colo.).

Plaintiffs in this "right to education" class action, filed in late December 1972, are the Colorado Association for Retarded Children and 19 named physically and mentally handicapped children, some of whom are retarded.

While this case was pending, the Colorado General Assembly passed a new Handicapped Children's Education Act. On June 19, 1974, the District Court ruled that passage of the Handicapped Children's Educational Act did not render plaintiffs' claims moot. The court found that prior statutes to provide equal education to handicapped children had not been implemented and stated that "The mere enactment of legislation without actual implementation does not render legal questions moot." It further ruled that plaintiffs' claims for compensatory damages were not moot as a result of the statute.

Motions for declaratory judgment and for certification of the class, filed by plaintiffs, as well as a motion to dismiss filed by several school district defendants, have been pending for several months. The motions to dismiss were heard by a three-judge panel on July 7, 1975, but no decision has been rendered.

Connecticut: Kivell v. Nemoitan, et al., No. 143913 (Superior Ct., Fairfield County, Conn.). Decided July 18, 1972.

This "right to education" suit was brought by the mother of a 12-year-old child who had been a "perceptually handicapped child with learning disabilities" since before February, 1970. The suit sought both a mandamus, directing the defendants--members of the Stamford, Connecticut Board of Education--to perform their duties towards the minor in accordance with state statutes mandating special education for an exceptional child, and money damages for reimbursement of tuition expended by the mother for an out-of-state educational facility. In a decision issued July 18, 1972, Judge Robert Testo found for the plaintiffs on both counts noting defendants' own admissions that the program offered to the plaintiffs for the school year 1970-71 by the defendants would not have met the minor plaintiff's special educational needs.

However, the court was careful to limit the scope of its holding. Judge Testo wrote:

> "This Court will frown upon any unilateral actions by parents in sending their children to other facilities. If a program is timely filed by a local board of education and is accepted and approved by the state board of education, then it is the duty of parents to accept said program. A refusal by the parents in such a situation will not entitle said child to any benefits from this Court."

District of Columbia: Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (U.S. D. Ct., D.C. 1972).

This case was brought as a class action before the Federal District Court in the District of Columbia. The complaint was filed on September 21, 1971.

Plaintiffs were school-age children, residents of the District of Columbia, who had been denied placement in a publicly supported educational program for substantial periods of time. Defendants were the Board of Education and its members, Mayor Washington, the Director of the Social Security Administration, and various administrators of the D.C. School System.

The named plaintiffs had been denied schooling because of alleged mental, behavioral, physical, or emotional handicaps or deficiencies. The named plaintiffs sued on behalf of a class of children who were or would be residents of the District of Columbia, were of an age so as to be eligible for publicly supported education, and were then, were during the 1970-1971 school year, or would be excluded, suspended, expelled or otherwise denied a full and suitable publicly supported education. Plaintiffs asked the court: (1) to declare their rights and to enjoin defendants from excluding them from the District of Columbia Public Schools and/or from denying them publicly supported education; (2) to compel the defendants to provide them with immediate and adequate education and educational facilities in the public schools or alternative placement at public expense; and (3) to give them additional relief to help effectuate the primary relief. The defendants in their answer to the complaint conceded that they had the legal "duty to provide a publicly supported education to each resident of the District of Columbia who is capable of benefiting from such instruction." Defendants' excuse for failing to provide such an education was the lack of necessary fiscal resources.

Judge Joseph C. Waddy entered an interim order in this case in December, 1971, requiring that the named plaintiffs be put into school. This interim order required defendants to make outreach efforts to identify other members of the plaintiff class and directed the parties to consider the appointment of a master. As defendants failed to comply with

the order, plaintiffs filed for summary judgment in January, 1972. At an open hearing on March 24, 1972, Judge Waddy orally granted summary judgment for the plaintiffs but delayed issuance of a detailed decree. On April 7, 1972, the Board of Education and its employees (alone among the defendants) submitted a proposed form of order and other materials.

On August 1, 1972, Judge Waddy's memorandum opinion, judgment, and decree were handed down. The court stated that there was no genuine issue of material fact as to the District's responsibilities because Congress had decreed a system of publicly supported education for the children of the District, and the Board of Education has been given the responsibility for administering this system according to law, including the responsibility for providing education to all "exceptional" children. Although defendants admitted their affirmative duty, the court noted that "throughout the proceedings it has been obvious to the court that the defendants have no common program or plan for the alleviation of the problems posed by this litigation and that this lack of communication, cooperation and plan is typical and contributes to the problem." The court based plaintiffs' entitlement to relief on applicable statutes and regulations of the District's Code and the United States Constitution. The D.C. Code requires that parents or guardians enroll children between seven and sixteen years of age in schools and sets criminal penalties for parents' failure to comply. "The court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children. The Board of Education is required to make such opportunity available."

As to the Constitutional basis for the holding, Judge Waddy found plaintiffs' right to education within the due process clause of the Fifth Amendment, and cited precedents such as Brown v. Board of Education (1954) outlawing school segregation, and Hobson v. Hansen (1967) abolishing the so-called track system in the district. The court held that "(t)he defendants' conduct here, denying plaintiffs and their class an equal publicly supported education while providing such education to other children, is violative of the Due Process Clause. Not only are plaintiffs and their class denied the publicly supported education to which they are entitled, but many are suspended or expelled from regular schooling or reassigned to specialized instruction without any prior hearing and are given no periodic review thereafter. Due process of law requires a hearing prior to exclusion, termination or classification into a special program."

Judge Waddy held further that defendants' failure to fulfill their clear duty could not be excused by the claim of insufficient funds. "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with

his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."

To implement the decision, the court placed responsibility with the Board of Education, and warned that a special master with educational expertise would be appointed if a dispute arose between the Board and the District government, or if there were inaction, delay, or failure by the defendants to implement the judgment and decree within the time specified. The court retained jurisdiction of the case to assure prompt implementation.

The judgment provides:

--That no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by rule, policy, or practice of the Board or its agents unless such child is provided: (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants; and (b) a constitutionally adequate prior hearing and periodic review of his status, progress, and the adequacy of any educational alternative.

--That defendants and those working with them be enjoined from taking any actions which would exclude plaintiffs and members of their class from a regular public school assignment without providing them with alternatives at public expense and a constitutionally adequate hearing.

--That the District of Columbia shall provide to each child of school age a free and suitable publicly supported education regardless of the degree of the child's mental, physical or emotional disability or impairment. Insufficient resources may not be a basis for exclusion.

--That defendants may not suspend a child from public schools for disciplinary reasons for more than two days without a hearing and without providing for his education during the period of suspension.

--That defendants must provide each identified member of the class with an education suited to his needs within 30 days; and must provide likewise for others similarly situated within 20 days after such persons become known to them.

--That defendants place announcements and notices in specified media, and meet specific notice requirements to parents.

--That defendants file within 45 days a comprehensive plan which provides for identification, notification, assessment and placement of class members; also, that defendants file within 45 days a report showing expungement from or correction of all official records of any plaintiff with regard to past expulsions, suspensions, or exclusions effected in violation of the procedural rights set forth in the order.

Judge Waddy further set out elaborate notice and hearing procedures relating to placement, disciplinary actions, and transfers. The presumption underlying placement would be that among the alternative programs of education, placement in a regular public school class with appropriate ancillary services is preferable to placement in a special school class.

Procedures to be followed include:

--Written notice by registered mail to the parent or guardian of the child.

--Notice that describes the proposed action in detail, clearly stating reasons; describing alternative educational opportunities; informing the parents or guardians of their right to object to the proposed action; informing them the child is eligible to receive for free the services of a diagnostic center for an independent medical, psychological, and educational evaluation; informing them of the right to representation at the hearing by legal counsel, and of the right to examine the child's school records. The hearing itself must be scheduled so as to be reasonably convenient for the parents or guardian.

--Some additional procedural safeguards are also written into the order.

Mills v. Board of Education expands the principle of the landmark PARC case so as to give the right to an individually appropriate public education not only to the mentally retarded but also to all other children suffering or alleged to be suffering from mental, behavioral, emotional, or physical handicaps or deficiencies. While the Pennsylvania decision rested upon a consent agreement between the parties, the Mills case is a pure constitutional holding, and thus has even stronger precedential value.

Because the time for filing an appeal expired without any notice of appeal having been filed by defendants, this decision is now a final and irrevocable determination of plaintiffs' constitutional rights.

Just as significant as the original decision has been the experience of implementing the Mills decree. Although the special education population tripled in three years, and the budget increased tenfold, the

defendants have still failed to develop programs for all the children; some children were still excluded from school two years after the decree; the classification hearings were temporarily terminated when funds for hearing officers expired, and the quality of existing programs is questionable and has never been evaluated.

Judge Waddy held the defendants in contempt of court in March, 1975 and in July, 1975 appointed Dr. Oliver Hurley, of the University of Georgia, as special master to oversee future implementation. Hurley's appointment represents the first use of a master in a contested right to education case and the results of his experience could have a broad impact on similar litigation.

Florida: Florida Association for Retarded Children, et al. v. State Board of Education, Civil Action No. 730250-CIV-NCR (U.S. D. Ct., S.D., Fla.).

The federal court abstained from this "right to education" suit following enactment of a state law which provided that a hearing must be accorded on request when a child is labeled exceptional or when a child is to be placed in a special class.

Pursuant to the abstention order, plaintiffs filed two petitions for mandamus in state court requesting the court to order implementation of state law requiring education of "exceptional students." The cases are reported below under the names of Florida ex rel. Grace v. Dade County Board and Florida ex rel. Stein v. Keller.

Florida: Florida ex rel. Stein v. Keller (formerly Florida Association for Retarded Children v. State Board of Education (see above), No. 73-28747 (Circuit Ct., Dade County, Fla.), filed November 26, 1973.

Plaintiffs sought enforcement of a Florida statute which requires the Department of Health and Rehabilitative Services to establish educational programs for all persons under 21 years of age who are under the Department's care.

The state provided adequate programming to the named plaintiff. Following resignations from the Florida Division of Retardation by the state director and the director of the local training center, plaintiffs voluntarily dismissed the suit to give the new officials an opportunity to meet their obligations to provide adequate programming throughout the state system.

Florida: Florida ex rel. Grace v. Dade County Board of Public Instruction (formerly Florida Association for Retarded Children v. State Board of Education (see above), No. 73-2874 (Cir. Ct., Dade County), filed November 26, 1973.

Plaintiffs in this case sought enforcement of a Florida statute which requires local school boards to provide special educational services within the district school system, in cooperation with other district school systems or through contractual arrangements with private school or community facilities.

The school board stipulated that it had an obligation under the Florida statutes to provide programming either directly or by contract. As a result, contracts were let to private, out-of-state schools for the two named plaintiffs. One plaintiff received compensatory damages of $5600 for the school's failure to contract out in the previous school year. The other plaintiff refused a $7000 compensatory damage award and is seeking a greater amount.

As a result of the suit, the state has implemented guidelines for local school boards' letting of contracts, and many have been let.

Florida; Wilcox, et al. v. Carter, et al., Civil Action No. 73-41-Civ. (U.S. D. Ct., M.D. Fla.), filed January 1973.

Named Plaintiff in this case was a mentally retarded child who brought suit on behalf of all children excluded from the Duval County school system.

On July 10, 1973, the federal district court abstained on grounds that the case involved questions of state law which should be first addressed by a state court.

Illinois: C. S., et al. v. Deerfield Public School District #109, Civil Action No. 73 L 284 (Circuit Ct., Nineteenth Judicial Circuit, Lake County, Ill.)

The plaintiffs in this case are a perceptually handicapped child and her parents.

Defendant is the school district in which the minor plaintiff attended school when she was enrolled in the second through the sixth grades.

Plaintiffs allege that as a result of the negligence of defendants' employees, the minor plaintiff was denied special education, to which she was legally entitled, for a learning disorder which was both discoverable and treatable. Plaintiffs claim that defendants' employees were negligent in one or more of the following respects:

1. They failed to administer the appropriate tests or make the appropriate evaluations which, if administered with reasonable care, would have revealed the nature of the minor plaintiff's learning disorder;

2. They failed, by careful observation or other means to correctly identify the minor plaintiff's learning disorder;

3. Although they knew or should have known about the minor plaintiff's learning disorder, they failed to provide her the special education services that would have properly treated the learning disorder.

Plaintiffs allege that the minor plaintiff has been substantially injured in that:

1. She will suffer permanent impariment that would have been ameliorated by early appropriate treatment;

2. She has been and will continue to be deprived of a meaningful education;

3. Her future learning capacity has been substantially reduced;

4. She has suffered emotional stress, and has been deprived of certain ordinary pleasures, such as reading without great difficulty.

Plaintiffs seek $100,000 damages for the injuries sustained by the minor plaintiff, $2,000 for money expended for special education by the adult plaintiffs on behalf of the minor plaintiff, and court costs.

A motion to dismiss filed by defendant has been pending for several months.

Illinois: W.E., et al. v. Board of Education of the City of Chicago et al., Civil Action No. 73 CH 6104 (Circuit Ct., Cook County, Ill.).

Plaintiffs in this class action are certain handicapped children, their parents, and all others similarly situated, who have been denied free educations.

Defendants are the Board of Education of the City of Chicago, and the Board of Education of School District #225, Cook County, Illinois, as well as all other school districts in Illinois which fail to provide free education to the minor plaintiff class.

Article 14 of the Illinois School Code provides inter alia:

"If because of his handicap the special education program of a district is unable to meet the needs of a child and the child attends a non-public school or special education facility that provides special education services required by the child and is in compliance with the appropriate rules and regulations of the Superintendent of Public Instruction, the school district in which the child resides shall pay the actual cost of tuition charged the child by that non-public school or special education facility or $2,000 per year, whichever is less, and shall provide him any necessary transportation."

Plaintiffs allege that it is impossible for the great majority of the minor plaintiff class to obtain the special education services they require at a cost of only $2,000 per year. Plaintiffs further allege that although all Illinois school districts are mandated by statute to provide free education for all persons between 6 and 20 years old, it is necessary for those responsible for the minor plaintiffs to pay for the education of the minor plaintiffs, solely because the minor plaintiffs are handicapped and live in school districts that are unable to meet their needs.

Plaintiffs seek the following relief:

1. A judgment declaring that the provision of the school code that sets a maximum limit on the charges for education that shall be paid by defendants violates the Illinois and United States Constitutions;

2. An injunction commanding the defendant class to make available in their own public schools the public education required by the minor plaintiffs, or alternatively, to pay the full costs of the education of the minor plaintiffs in non-public schools or special education facilities;

3. A judgment against the defendant class for the amount the plaintiff classes have paid, or have incurred obligations to pay, for the education of the minor plaintiff class;

4. Such other relief as the court deems just and proper, including a judgment for costs and reasonable attorneys' fees.

A motion to dismiss filed by defendants has been pending for several months.

Indiana: Dembrowski v. Knox Community School Corporation, et al., Civil Action No. 74-210 (Starke Circuit Ct., Ind.), filed May 15, 1974.

Plaintiffs in this "right to education"case are a neurologically impaired/learning disabled child and his parents. Plaintiffs sued various

Indiana institutions and officials to compel them to establish and maintain an educational program suited to the minor plaintiff's needs. Plaintiffs also sought damages for money expended for the education of the minor plaintiff during the 1974-1975 school year.

Following denial of their motion to dismiss, defendants agreed to place the minor plaintiff in a special education class. The issue of damages is expected to be tried in the fall or winter.

Kentucky: Kentucky Associationa for Retarded Children v. Kentucky, No. 435 (U.S. D. Ct., E.D., Ky.). Consent Decree, November, 1974.

This right to education class action was settled by a consent decree, in which the parties stipulated inter alia, that children with physical, mental, emotional, or learning handicaps have the same right to an equal educational opportunity as other children.

Maryland: Maryland Association for Retarded Children, Leonard Bramble v. State of Maryland, Civil Action No. 720733-K (U.S. D. Ct., Md.). In the Maryland State Court, Equity No. 77676 (Circuit Ct. for Baltimore County), decided April 9, 1974.

On April 9, 1974, the Maryland state trial court issued its decision in this class action right to education lawsuit. The case was litigated in the Maryland state court after the United States District Court for Maryland abstained.

In his opinion, Judge Raine determined that the defendants had not violated any provisions of the Maryland State Constitution. Judge Raine did, however, examine defendants' conduct under the requirements of various Maryland statutes, and entered a decree ordering the defendants to take certain steps to insure compliance with those statutes. He determined that the timetable for providing education for handicapped children (requiring adoption of state standards by July 1974, and adoption of local plans nine months thereafter; implementation of these plans beginning with the 1975 school year, and requiring full implementation within five years) was sufficient despite plaintiffs' objection that these steps could be taken more quickly.

The Maryland ARC case holds inter alia that:

--Local boards of education must determine that an educational program provided for a child is educational and appropriate for the child.

--Placement in a nonpublic day facility, a public or private residential facility, and home and hospital instruction may (although not necessarily) constitute an appropriate program.

--The local school boards cannot discharge their responsibilities simply by referring the child to another agency, if the child is merely placed on a waiting list by the agency.

--State authorities must promulgate standards for the accreditation of all education facilities, including day care centers and residential treatment facilities.

--Home instruction must only be used when the child is prevented by physical conditions from attending school; home instruction will not be justified by mental retardation alone.

--If public agencies place children in private programs, the state or local school board must provide full funding to insure that the program is delivered free of charge to the parents.

--Local boards of education have the obligation to provide daily transportation to and from the educational facility.

On May 30, 1974, a further hearing was held before Judge Raine. At the hearing, attorneys for the state announced that the state would not appeal Judge Raine's decision but instead would commit itself to full compliance with the decree commencing September, 1975. On the strength of those commitments, Judge Raine allowed the state until September, 1975 to comply with his decree. In addition, Judge Raine retained jurisdiction of the case.

Michigan: Harrison, et al. v. State of Michigan, et al., Civil Action No. 38557 (E.D., Michigan).

This "right to education" class action for declaratory and injunctive relief was dismissed on motion due to mootness. The court held that it would be unable to devise and implement a plan prior to September, 1973, the effective date of a Michigan statute requiring mandatory education for all handicapped children, including the mentally retarded. In dismissing the complaint, the court held for the first time in Michigan that the handicapped have an equal protection right to education.

New York: Reid v. Board of Education of the City of New York, No. 8742 (Commissioner of Education for the State of New York) decided November 26, 1973. Federal Court Abstention Order, 453 F.2d 238 (2d Cir. 1971).

This class action was brought on behalf of parents whose educable, brain-damaged children either had been determined eligible for special public school classes, but had not yet been placed in such classes, or had been referred to those classes after preliminary screening and were awaiting a final screening. Plaintiffs sought a declaratory judgment and preliminary and permanent injunctions to prevent a deprivation under

color of state law of rights protected by the Fourteenth Amendment. The defendants were the Board of Education of the City of New York and its Chancellor.

The complaint in this case alleged that over 400 children in New York City had been preliminarily diagnosed as brain-damaged, but were awaiting screening, and that, at the current rate, it would take two years until all had their eligibility determined. Over 200 other children had been found eligible, and were awaiting placement in special classes. Plaintiffs further alleged that the failure of defendants to screen all applicants for the public school classes within a reasonable time and to provide special public school classes for all eligible children denied plaintiffs and members of their class their rights under the equal protection and due process clauses.

On June 22, 1971, Judge Metzner for the U.S. District Court for the Southern District of New York denied the motion for a preliminary injunction, and granted the defendants' motion to dismiss. The court applied the abstention doctrine, reasoning that since there was no charge of deliberate discrimination, this was a case where the state court could provide an adequate remedy and where resort to the federal courts was unnecessary.

On appeal, the Second Circuit Court of Appeals vacated the District Court order, and remanded the case on a rather technical, but still important, point. The three-judge panel, in a December 14, 1971, decision, ruled that federal jurisdiction should have been retained pending a determination of the state claims in New York state courts.

Pursuant to the Second Circuit Court of Appeals decision on abstention, plaintiffs filed their complaint with the State Commission of Education.

On November 26, 1973, the State Commissioner of Education handed down his ruling in this case. He decided that the New York City educational authorities had violated plaintiffs' statutory right to education and ordered relief to alleviate the situation. In so holding, the commissioner made the following specific findings of facts and conclusions of law:

--that a "class appeal" was proper in this case:

--that there were a number of deficiencies in the way that the educational authorities had implemented the law including: delays in examination and diagnostic procedures; failure to diagnose handicapped children and place them in suitable programs; abuse of the home instruction program; illegal expulsion of children for "medical reasons"; inadequate census data about handicapped children; inadequate parental involvement in the special education programs; improper procedures for suspending handicapped children without notice; and inadequate alternatives; and

--that the creation of the Medical Discharge Register was not authorized by state law and was an attempt to circumvent the duty to give adequate educational services.

After making these findings, the Commissioner proceeded to order the following relief:

--that the "medical discharge register" be discontinued;

--that all handicapped students be placed in appropriate public or private school classes;

--that "home instruction" be carried out consistent with the laws authorizing it;

--that proper procedures be followed in determining who would be "exempted" from classes;

--that plans to eliminate waiting lists, to regionalize evaluation of handicapped children, to meet the needs of junior high and high school aged handicapped children, and to apprise parents of educational programs for the handicapped be developed by February 1, 1974.

North Carolina: Hamilton v. Riddle, Civil Action No. 72-86 (Charlotte Division, W.D., N.C.).

This "right to education" class action was filed May 5, 1972, on behalf of a mentally retarded eight-year-old and all other school-age mentally retarded children in North Carolina. Defendants include the Superintendent of the Western Carolina Center, a state institution for the mentally retarded; the Secretary of the North Carolina Department of Human Resources; the state Superintendent of Public Instruction; and the Chairman of the Gaston County Board of Education.

The case is being held in abeyance pending the court's decision in North Carolina Associaton for Retarded Children v. North Carolina Board of Public Education.

North Carolina: North Carolina Association for Retarded Children, Inc., et al. v. The State of North Carolina Board of Public Education (U.S. D. Ct., E.D., N.C.), filed May 18, 1972.

This is a "right to education" class action filed on behalf of all persons who are residents of North Carolina, age 6 and over, who are eligible for free public education, but who have by the defendants (1) been excluded or (2) been excused from attendance at public schools or (3) had their admission postponed or (4) otherwise been refused free access to public education or training commensurate with their capabilities because they are retarded. The United States has joined the suit

as a party-plaintiff. Defendants include the state of North Carolina, the State Board of Education, various school districts, and the Board of County Commissioners.

Since the commencement of this suit, a new right to education statute was enacted by the state. The parties are evaluating the impact of that litigation on the non-institutional plaintiffs.

A pre-trial conference is now set for October 1, 1975.

North Dakota: In re G.H., Civil Action No. 8930 (Supreme Ct., N.D.) Decided April 30, 1974.

At issue in this case was the liability for the costs of the education of a handicapped child who was a resident in a school for crippled children in North Dakota, and who was made a ward of the state in 1970. The dispute arose when the child's parents left the state in 1969, followed by a refusal by the school district in which they had previously resided to continue paying for the child's education.

On appeal of a court order requiring various agencies to pay for the child's education, the Supreme Court of North Dakota held, inter alia:

1. The right to a public education is a right guaranteed by the North Dakota Constitution;

2. The failure to provide an equal educational opportunity for handicapped children (except those, if there are any, who cannot benefit at all from it) violates the United States and North Dakota Constitutions;

3. The residence of a child determines the identity of the school district responsible for providing educational opportunity for the child. Moreover, assignment of the child to a special education school outside the district of the child's residence does not change the residence of the child;

4. The residence of a child who is made a ward of the state is separate from that of her parents.

The court specifically reserved for future determination whether those who have been unconstitutionally deprived of education in the past have a constitutionally based claim for compensatory educational effort.

North Dakota: North Dakota Association for Retarded Children v. Peterson (U.S. D. Ct., N.D.), filed November 1972.

This class action right to education suit was filed on behalf of the North Dakota Association for Retarded Children and thirteen named children who represent the class of all other children similarly situated.

The defendants in this suit include the State Superintendent of Public Instruction, the State Board of Education, the State Director of Institutions, the Superintendent of the State School for the Mentally Retarded, and six local school districts which are representative of all such school districts in the state.

The complaint alleges that only about 27% of the 25,000 children in North Dakota who need special education services are enrolled in such programs. The relief sought is for defendants to provide, maintain, administer, supervise, and operate classes and schools for the education of the retarded and other handicapped children throughout the state of North Dakota; to provide educational opportunitites to children at the Grafton State School, and to require compensatory education to plaintiff children and their class who have incurred disabilities because they have not been provided with meaningful education suited to their needs.

After the commencement of this action the state legislature enacted a law providing for virtually all of the demands of the lawsuit. The law, however, does not require full implementation of plans for education of the retarded and the handicapped until July 1, 1980.

Plaintiffs are engaged in negotiations aimed at obtaining implementation at an earlier date.

Ohio: Cuyahoga County Association for Retarded Children and Adults, et al. v. Essex, No. C 74-587 (U.S. D. Ct., N.D., Ohio).

Named plaintiffs in this "right to education" class action are the Cuyahoga County Association for Retarded Children and Adults and six retarded school-age children. Plaintiffs sue on their own behalf and on behalf of all school-age Ohio residents who have been denied an educational or training opportunity simply because of their mental disabilities.

Party defendants are the Department of Education, the Department of Mental Health and Mental Retardation, and the Board of Education for the state of Ohio.

Plaintiffs seek declaratory and injunctive relief.

In an order dated April 30, 1975, a three-judge court: (1) denied motions by defendants to dismiss the suit and to dismiss the Cuyahoga County Association for Retarded Children and Adults as a party plaintiff; and (2) granted plaintiffs' motion to certify the class.

Pennsylvania: Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al., 344 F. Supp. 1275 (3-judge Court, E.D. Pa. 1971).

The opinion and order in this case, issued October 7, 1971, was the first important legal breakthrough in the vindication of the rights of the mentally retarded.

The plaintiffs in this class action were the Pennsylvania Association for Retarded Children, 14 named retarded children who were denied an appropriate education at public expense in Pennsylvania, and all other children similarly situated. The defendants were the Commonwealth of Pennsylvania, the Secretary of the Department of Education, the State Board of Education, the Secretary of the Department of Public Welfare, certain school districts and intermediate units in the Commonwealth of Pennsylvania, their officers, employees, agents and successors.

After an initial complaint was filed on January 7, 1971, the parties agreed to certain findings and conclusions and to relief to be provided to the named plaintiffs and to the members of their class.

A stipulation by the parties, approved and ordered into effect by the court on June 18, 1971, focused on the provision of due process rights to children alleged to be mentally retarded. The court's order specifically states that no such child may be denied admission to a public school program or have his educational status changed without first being accorded notice and the opportunity for a due process hearing. This June 18 order outlines due process requirements in detail, beginning with provisions to ensure notification of parents that their child is being considered for a change in educational status and ending with detailed provisions for a formal due process hearing, including representation by legal counsel, the right to examine the child's record before the hearing, the right to present evidence of one's own, to cross-examine other witnesses, the right to independent medical, psychological and educational evaluation, the right to a transcribed record of the hearing, and the right to a decision on the record. All of these due process procedures went into effect on June 18, 1971.

Further stipulations by the parties, going beyond the provision of due process at placement hearings, were formally ordered into effect by the court's October 7, 1971, interim order, injunction, and consent agreement. Under this order, defendants are bound to refrain from applying various sections of the School Code of 1949 in such a way as to deny any mentally retarded child access to a free public program of education and training in violation of the equal protection clause of the Fourteenth Amendment.

The parties' consent agreement states that:

"expert testimony in this action indicates that all mentally retarded persons are capable of benefiting from the program of education and training; the greatest number of retarded persons, given such education and training, are capable of achieving self-sufficiency, and the remaining few, with such education and training, are capable of achieving some degree of self-care; that the earlier such education and training begins, the more thoroughly and the more efficiently the mentally retarded person will benefit from it; and, whether begun early or not, that a mentally retarded person can benefit at any point in his life and development from the program of education and training....It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school class is preferable to placement in any other type of program of education and training."

The consent agreement and order provided that each of the named plaintiffs should be immediately re-evaluated by defendants and, as soon as possible, but in no event later than October 13, 1971, should be accorded access to a free public program of education and training appropriate to his learning capacities.

It was further ordered that, as soon as possible, but in no event later than September 1, 1972, every retarded person between the ages of 6 and 21 years of age as of the date of the order and thereafter, should be provided access to a free public program of education and training appropriate to his capacities.

The court's order further requires that the State Department of Education shall supervise educational programs within state institutions for the retarded, and that there shall be automatic re-evaluation of all children placed on homebound instruction every three months.

To implement the aforementioned relief and to assure its extension to all members of the plaintiff class, the court appointed two masters for the purpose of overseeing a process of identification, evaluation, notification, and compliance. Defendants were given a time schedule within which to formulate and submit to the masters for approval a plan for the implementation of the consent agreement which would result in the placement of all retarded children in programs by September 1, 1972.

On May 5, 1972, the court entered a final opinion, order and decree in this case, rejecting arguments by members of the defendant class who were not parties to the earlier stipulations that the court lacked jurisdiction to decide this case and/or should abstain from deciding the

case until a state court had first had opportunity to hear and decide plaintiffs' claims.

Washington: Rockafellow, et al. v. Brouillet, et al., No. 787938 (Superior Ct., King County, Wash.).

Plaintiffs in this class action are divided into two categories. Plaintiffs in Class I represent all residents of five institutions for the mentally retarded who are under 21 years of age. Plaintiffs in Class II represent all residents of the five institutions who are over 21 years of age, and who did not receive adequate and appropriate educational activities and programs during their institutionalization when they were of school age.

Defendants are state officials responsible in various ways for educational programs in the institutions for the mentally retarded.

Plaintiffs in Class I allege that they are not now receiving an adequate and appropriate educational program, defined as one equal in quality and duration to that provided to intellectually normal students of the same chronological age in the same school district, though directed to the unique needs, abilities and limitations of the individual resident.

Specifically, plaintiffs in Class I allege that arbitrarily, and without notice or hearing, they are being excluded from educational programs, or included in educational programs which provide less class time than is provided intellectually normal children.

Plaintiffs in Class II allege that they were similarly deprived when they were of school age.

Plaintiffs seek a writ of mandate, ordering the defendants to perform the following:

1. Enroll each Class I plaintiff in an adequate and appropriate educational program;

2. Continue enrollment of each Class I plaintiff in an equivalent educational program after the plaintiff has reached age 21, until all class time unlawfully withheld has been restored on a minute-for-minute basis;

3. Enroll each Class II plaintiff in an adequate and appropriate educational program until all class time unlawfully withheld has been restored on a minute-for-minute basis;

4. Provide for proper notice and fair hearing prior to the exclusion to any extent from an educational program.

A motion to dismiss by the school district based on a failure to state a claim has been denied. The state agency defendants moved to dismiss on other grounds:

1. That plaintiffs had failed to exhaust administative remedies;

2. That plaintiffs had failed to state a cause of action since educational opportunity as defined by plaintiffs is not actionable;

3. That mandamus was inappropriate, since the acts sought are discretionary and outside defendants' financial power to perform.

On February 26, 1975, the court found that a cause of action was stated, but dismissed on the sole ground that the plaintiffs had failed to exhaust administrative remedies. That order is now being appealed in the Court of Appeals of Washington.

West Virginia: Doe v. Jones (Hearing before the State Superintendent of Schools). Decided January 4, 1974.

Petitioners in this class action lawsuit were minor residents of Spencer State Hospital in Roane County, West Virginia.

The respondents were the Board of Education and Superintendent of Schools of Roane County, West Virginia.

The petitioners claimed that the respondents had denied them the right to attend the public schools of Roane County in violation of state law and the Fourteenth Amendment to the United States Constitution. The petitioners had agreed that they would permit the Director of Spencer State Hospital to certify which of the children at the hospital would be able to benefit from public school education and abide by that certification.

The state Superintendent ruled that under West Virginia statutory law, the school board must admit all students residing in the school district to district schools regardless of the student's domicile for other purposes. He further ruled that a student may only be excluded for conduct specified by statute (i.e., disorderly, refractory, indecent or immoral conduct) but that before exclusion for these reasons is permitted, the student must be afforded a due process hearing on the exclusion.

The state Superintendent ordered the school board to admit to the county schools those students certified by the Director of the Spencer State Hospital.

Wisconsin: Marlega v. Board of School Directors of City of Milwaukee, Civil Action No. 70C8 (U.S. D. Ct., E.D., Wis.). Consent Decree, September, 1970.

This class action was brought on behalf of all students in the City of Milwaukee, Wisconsin. Plaintiffs sought to restrain the public school system from excluding a student for alleged medical reasons without a full, fair, and adequate hearing which meets the requirements of due process of law, to determine if he is medically able to attend school on a full-time basis. The defendants in this case were the Board of School Directors of the City of Milwaukee, Wisconsin, and their superintendent.

A stipulation by the parties, which outlined in detail the necessary procedures for excluding a child from the public schools was approved and ordered into effect by the court in September of 1970. The action was then dismissed without prejudice and without costs to either party.

Wisconsin: Panitch, et al. v. State of Wisconsin, Civil Action No. 72-L-461 (U.S. D. Ct., Wis.), filed August 14, 1974.

This class action right to education case was brought against the state of Wisconsin on behalf of all educable handicapped children between the ages of four and twenty who were being denied education at public expense.

During the pendency of the litigation, Chapter 89 of the laws of Wisconsin was enacted, which modified Wisconsin laws regarding education of the handicapped.

On February 21, 1974, a three-judge district court ruled that Chapter 89 of the laws of Wisconsin became effective on August 9, 1973, and gave plaintiffs most of what they sought in their complaint. However, the court did not rule that the case was moot, because it was not yet clear that the statute would be effectively administered to provide education to all handicapped children. Therefore the court decided to stay its hand, to give the state an opportunity to implement Chapter 89. The defendants were directed to submit a report on implementation to the court by September 1, 1974, and the court retained jurisdiction over the case in order to monitor implementation.

Plaintiffs utilized the procedures set up by the new Education for the Handicapped Statute to successfully challenge a decision of the school board regarding the named plaintiff's placement. A "multi-disciplinary team" had recommended that plaintiff remain in a program in Pennsylvania and that the school board provide funds for her participation. The school board rejected the team's recommendation and plaintiffs appealed to the state Superintendent of Schools who took no action. Plaintiffs then went into court and obtained a ruling that the school board did not have the authority to overrule the decision of the multi-disciplinary team. As a result, plaintiff remained in the Pennsylvania program.

Wisconsin: State of Wisconsin ex rel. Warren v. Nusbaum, ____ Wisc.2d ____, 219 N.W.2d 577 (Supreme Ct., Wis. 1974).

This action was brought by the Attorney General of Wisconsin to test the constitutionality of Chapter 89 of the Wisconsin Statutes, which provides in part that public funds may be paid to private schools which provide educational programs for mentally retarded persons.

The Supreme Court of Wisconsin unanimously ruled that the statute does not violate either the United States or Wisconsin Constitutions. The court found that the primary purpose of the statute was to foster secular, not religious ends; that the primary effect is to educate retarded persons, not promote religion; and that the program will not cause the state to be excessively entangled with religion. Further, the program was not found to be for the "benefit of religion" in the terms of the Wisconsin Constitution.

With this ruling, the state officials are free to implement the program provided for by Chapter 89.

F. EMPLOYMENT

District of Columbia: Souder, et al. v. Brennan, et al., 367 F. Supp. 808 (U.S. D. Ct., D.C. 1973).

This class action, arising under the Fair Labor Standards Act (FLSA) of 1938, as amended in 1966, was filed on March 13, 1973, by three named mentally ill and mentally retarded residents in state institutions and by the American Association on Mental Deficiency and the National Association for Mental Health. Plaintiffs sought to compel the defendant Secretary of Labor and his subordinates to perform their alleged statutory duty to enforce the minimum wage and overtime compensation provisions of the FLSA against non-federal institutions for the mentally handicapped so as to ensure that the thousands of institutional residents who perform labor for such institutions without pay or for merely token wages would be justly compensated.

The defendants were the Secretary of Labor, Peter J. Brennan, and four of his subordinate administrators. No state agencies or individual institutions were defendants. This was not an action to obtain back wages or money damages of any kind, but rather to require prospective enforcement of plaintiffs' alleged statutory rights. Because this suit was directed toward federal Department of Labor officials, it circumvented the sovereign immunity and Eleventh Amendment obstacles raised in suits for private damages and crystallized in the Supreme Court decision Employees of the Department of Public Health and Welfare of Missouri. (See below.)

In 1966, the FLSA was amended to extend minimum wage and overtime provisions to all nonprofessional and nonsupervisory employees of institutions, hospitals, and schools for the mentally handicapped. Patients and resident workers were not explicitly exempted, but the Department of Labor, responsible for the overall administration and enforcement of the FLSA, had never enforced the minimum wage and overtime provisions for patient and resident workers.

In May, plaintiffs and defendants filed cross motions for summary judgment. Defendants alleged that "the action challenges matters left to the unreviewable discretion of the executive, and therefore shall be dismissed." In addition, defendants submitted documents to show there was no genuine issue as to any material fact.

On May 29, 1973, plaintiffs filed a cross motion for summary judgment, supported by a "Statement of material facts as to which plaintiffs contend there is no genuine issue" and a memorandum of points and authorities. Although defendants had conceded that patient-workers were covered under the FLSA, plaintiffs emphasized the need for the court to "make a clear and unequivocal ruling concerning coverage, in order that both institutional employers and patient-workers will be apprised of their duties and rights. As defendants' own papers show, they have pursued an 'on-again, off-again' position on the issue of coverage." Then, plaintiffs attacked the legitimacy of defendants' non-enforcement policy and argued that defendants had not met their legal obligation to enforce the FLSA on behalf of patient-workers.

The court denied defendants' motion for summary judgment on July 27, 1973, on the grounds that "Defendants' contention that their unreviewable discretion controls this matter is ill-founded."

In the order, Judge Aubrey Robinson indicated that "an important question of Congressional intent exists as to coverage of hospital patient-workers under the 1966 amendments to the Fair Labor Standards Act." All parties were ordered to submit supplementary memoranda of law on the legislative history of those amendments within sixty days.

The American Federation of State, County and Municipal Employees, AFL-CIO moved to intervene as a plaintiff, and the court granted this motion on June 6, 1973.

On November 14, 1973, the court granted plaintiffs' motion for summary judgment. In its opinion, the court dismissed defendants' argument that whether to enforce the FLSA on behalf of patient-workers lay in the unreviewable administrative discretion of the Secretary, observing that if the FLSA did apply to such patient-workers, then the policy of non-enforcement would be a violation of the Secretary's duty to enforce the law. In resolving the issue of the applicability of the FLSA to patient-workers, the court noted the basic canon of statutory construction that

when statutory language is clear on its face and fairly susceptible of but one construction, that construction must be given it. Supporting the court's reading of the plain language of the FLSA as covering patient workers is the fact that although the FLSA contains specific exemption provisions, Congress had not seen fit to specifically exclude patient-workers from coverage. The court also accorded substantial weight to the fact that the initial and consistent interpretation of those most closely concerned with the administration and enforcement of the Act had been to recognize its applicability to patient-workers. Specifically, the court noted an official administrative interpretation, still not rescinded, that patient-workers as a class were included in the terms of the 1966 Amendment extending coverage and the fact that non-enforcement of this admitted policy had been ascribed by defendants through the development of the case solely to administative difficulties and unresolved problems in the mechanics of enforcement. Finally, the court found that the legislative history of Section 14 of the FLSA, which establishes a procedure whereby less than normally productive handicapped workers can be certified as such by the Secretary of Labor and paid an appropriate competitive rate for their services, supported the proposition that the productive labor of handicapped persons was generally intended by the Congress to be covered by the FLSA where the statutory prerequisites for coverage were otherwise met. For these reasons, the court ordered the Secretary of Labor "to implement reasonable enforcement efforts applying the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to patient-workers in non-Federal institutions for the residential care of the mentally ill and the mentally retarded."

Addressing the defense of the Department of Labor that it is very difficult to distinguish between work and work-therapy or vocational training, the court commented:

> "Economic reality is the test of employment and the reality is that many of the patient-workers perform work for which they are in no way handicapped and from which the institution derives full economic benefit. So long as the institution derives any consequential benefit the economic reality test would indicate an employment relationship rather than mere therapeutic exercise. To hold otherwise would be to make therapy the whole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like....The fallacy of the argument that the work of patient workers is therapeutic can be seen in extension to its logical extreme, for the work of most people inside and out of institutions is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way. Yet that can hardly mean that employers should pay workers less for what they produce for them."

On December 7, 1973, the court issued a declaratory judgment and injunction order granting the following relief:

--that defendants, within 120 days, notify the Superintendent of each non-Federal facility for residential care of the mentally retarded and/or mentally ill that resident workers are covered under the FLSA and that the Secretary intends to enforce the Act on their behalf. Moreover, that the Secretary request the Superintendents to keep required records and to inform resident-workers at their facilities of their rights;

--that the defendants undertake reasonable enforcement activities on behalf of patient-workers; and

--that the Secretary shall keep written records of his enforcement activities which shall be made available to the public through the Labor Department's Advisory Committee on Sheltered Workshops at six-month intervals. These reports are to include a description of the activities taken to comply with the order; the number of investigations of alleged violations of rights of patient-workers under the FLSA (including a breakdown by type of establishment and number of workers involved in each such establishment), and the reason for such investigation; the results of each such investigation; and the disposition of each investigation confirming statutory violations, including lawsuits, settlements, and other enforcement activities.

(The order also sets forth what the court considers to be satisfactory indications that proper attention has been given to informing patient-workers of their rights.)

No appeal was taken, and the Department of Labor is now implementing the court's order.

Florida: Roebuck, et al. v. Florida Department of Health and Rehabilitative Services, et al., 502 F.2d 1105 (5th Cir. 1974).

This is a class action suit brought by and on behalf of named plaintiffs and all other persons who have been wrongfully classified as "handicapped trainees" and have been receiving or are now receiving subminimum wages as a result of this classification. Defendants are Sunland Hospital of Tallahassee; W. T. Cash Hall, Inc.; Miracle Hill Nursing and Convalescent Home, Inc.; and other employers unknown to plaintiffs, who are subject to the provisions of the Fair Labor Standards Act (FLSA).

The complaint alleges that the Department of Health and Rehabilitative Services and the Division of Vocational Rehabilitation have classified plaintiffs as "handicapped trainees" on the basis of discriminatory tests and despite the fact that they are not actually handicapped in terms of their productive capacity. This classification is then certified by the Department of Labor solely on the recommendation of the

defendants. Upon making the determination that plaintiffs are handicapped, the defendants have placed the plaintiffs in positions as "trainees" for which they are paid eighty cents per hour, an amount which represents 50% of the minimum wage established by the FLSA.

The complaint further alleges that defendants:

--Have classified the plaintiffs as "handicapped" when the classification is not related to the job task to be performed;

--Have placed the plaintiffs in menial unskilled or low-skilled jobs instead of bona fide training opportunities;

--Have paid wages to the plaintiffs that were not commensurate with those paid to non-handicapped workers in industry in the vicinity for essentially the same type, quality, and quantity of work; and

--Have paid the plaintiffs 50% of the minimum wage when the FLSA states that a rate may not be less than 75% of the minimum.

Plaintiffs claim that this alleged practice of classifying the plaintiffs as "handicapped," and assigning them to jobs at sub-minimum wages violates their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

The plaintiffs seek the following relief:

--The defendants Department of Health and Division of Vocational Rehabilitation be enjoined from seeking handicapped trainee certificates in violation of the United States Constitution and the FLSA;

--The defendants Sunland Hospital, W. T. Cash Hall and Miracle Hill be required to pay back wages owed to plaintiffs and the members of the class they represent and damages in an amount equal to back pay;

--The court award costs and attorneys' fees to the plaintiffs.

Defendants in this case moved to dismiss. The District Court dismissed the suit for lack of jurisdiction, based on the Supreme Court decision in Employees of the Department of Public Health and Welfare of the State of Missouri (see below).

On October 11, 1974, the Fifth Circuit Court of Appeals reversed the District Court decision dismissing the suit and remanded for further proceedings.

The Court of Appeals held that since the United States Supreme Court decision which was the basis for dismissal did not preclude action for injunctive relief, the dismissal by the District Court was improper.

Indiana: Sonnenburg v. Bowen, No. 74 P.S.C. 1949 (Porter County Circuit Ct., Ind.), filed October 9, 1974.

Plaintiffs are present and past residents of Dr. Norman M. Beatty Memorial Hospital.

Defendants are the governor and mental health commissioner of Indiana, who are responsible for the operation of the hospital.

Plaintiffs claim that they have performed labor for Beatty Hospital without being paid just compensation for their work in violation of the Fair Labor Standards Act (FLSA) and the Fifth and Thirteenth Amendments to the United States Constitution. In addition, plaintiffs claim that the failure to pay just compensation violates their right to adequate treatment.

Plaintiffs seek declaratory and injunctive relief to compel the defendants to enforce the FLSA. Additionally, they seek damages in the sum of $15 million.

A motion to dismiss by defendants has been denied. Defendants have yet to file an answer to the complaint.

Iowa: Brennan v. State of Iowa, 494 F.2d 100 (8th Cir. 1973).

Plaintiff in this suit to enforce the Fair Labor Standards Act (FLSA) was the Secretary of Labor.

The defendant was the State of Iowa as owner of various mental and penal institutions.

The Eighth Circuit ruled that employees in these institutions are "engaged in commerce" and therefore are covered by the FLSA. The rationale for finding that the employees are engaged in commerce is that (1) regular activities of the employees are interstate in nature (such as sending invoices out of state, making interstate telephone calls, accompanying patients out of state for treatment or diagnosis, etc.); and (2) that the employees physically possess goods that are in interstate commerce.

The court ruled further that the assessment of back wages would be an appropriate remedy in such a case, even though the defendant is a State.

Under the decision by the United States District Court for the District of Columbia in Souder v. Brennan (see below) patient workers in these mental and penal institutions are among the employees covered by this decision.

Maine: Jortberg v. Maine Department of Mental Health, Civil Action No. 13-113 (U.S. D. Ct., Maine), Consent Decree, June 18, 1974.

On June 18, 1974, the parties in this Federal suit entered into a consent decree compelling the state to pay the minimum wage to patient workers in state institutions for the mentally handicapped.

The decree provided, inter alia:

1. that the state pay the full minimum wage to any resident of an institution who performs "work" which was defined to include almost any kind of labor except those activities denominated "personal-housekeeping work" unless the Labor Department has certified that such resident may be paid a sub-minimum wage because of individual characteristics;

2. that residents be given the opportunity to apply for any job classification in the institution and that they be notified of such right;

3. that the officials of the institution refrain from punishing or withholding privileges for failure or refusal by residents to perform work.

A stipulation accompanying the consent decree set forth the violations of the Fair Labor Standards Act by the defendants.

Missouri: Barnes, et al. v. Robb, et al.

Reported under Treatment section.

Missouri: Employees of the Department of Public Health and Welfare, State of Missouri v. Department of Public Health and Welfare of the State of Missouri, 411 U.S. 279 (1973).

This United States Supreme Court case, although brought on behalf of regular employees of the State of Missouri's state hospitals and training schools, has profound implications for court cases on behalf of allegedly mentally handicapped workers for wages and overtime payments under the Fair Labor Standards Act (FLSA).

Petitioners are employees of five mental hospitals, a cancer hospital, and the state training school for girls, all operated by the State of Missouri. Respondents are the Department of Public Health and Welfare and various officials having supervision over the state hospitals and training schools, who are sued in their official capacities and as individuals.

Petitioners brought this class action suit in the U.S. District Court for the Western District of Missouri on August 4, 1969, to recover unpaid overtime compensation allegedly due them under Section 16(b) of the FLSA, as amended. The district court sustained respondents' motion to dismiss the complaint upon the ground that this is a suit by citizens of the state against the state and as such is barred by the 11th Amendment. After a reversal by a three-judge panel of the 8th Circuit Court of Appeals and a reinstatement by a five-to-four decision of the Court of Appeals en banc, the trial court's dismissal of the complaint by the state employees against the state of Missouri agencies was appealed to the United States Supreme Court.

On April 18, 1973, the Supreme Court, by a vote of 8 to 1, affirmed the ruling by the District Court and the Court of Appeals en banc. The majority opinion, written by Justice Douglas and joined in by five others held that the history and tradition of the Eleventh Amendment indicate that a federal court is not competent to render judgment against a non-consenting State. The majority noted that the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. According to the majority's reasoning, Congress could by means of the commerce power give force to the supremacy clause by lifting the sovereignty of the state and putting the states on the same footing as other employers. But the majority noted that it could not find a word in the history of the 1966 Amendments to indicate a purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the federal courts. The majority stated that its jurisdictional ruling would not make Congress' extension of coverage to state employees meaningless since Section 16(c) of the FLSA still gives the Secretary of Labor power to bring suit for unpaid minimum wages or unpaid overtime compensation, and Section 17 gives the Secretary power to enjoin violations of the Act and to obtain restitution on behalf of employees. The Secretary of Labor may still, of course, act on behalf of a state employee because suits by the United States against a state are not barred by the Constitution. The majority noted the number of employees and employers covered under the FLSA and noted objections that if a direct federal court remedy in the form of private damage actions was denied, the court would in effect be recognizing that the FLSA provides a right without any remedy. But according to the majority "Sect. 16(b), however, authorizes employee suits in 'any court of competent jurisdiction.' Arguably that permits suit in the Missouri courts but that is a question we need not reach."

Ohio: Souder v. Donahey, et al., No. 75222 (Supreme Court, Ohio)

Plaintiff in this case was one of the named plaintiffs in Souder v. Brennan. Following the declaratory judgment in Souder v. Brennan, plaintiff filed this suit in the Common Pleas Court of Franklin County, Ohio, in an attempt to recover the unpaid minimum wages and overtime compensation owed to him by the state of Ohio.

Defendants moved to dismiss the suit based on a claim of sovereign immunity.

The trial court granted defendants' motion to dismiss and the Franklin County Court of Appeals affirmed.

Plaintiff filed a Motion to Certify with the Ohio Supreme Court on the question of whether the state may defend against the minimum wage claim on the basis of sovereign immunity. On April 25, 1975, the court accepted jurisdiction for the purpose of deciding that question.

The case is currently being briefed and will be set for oral argument in the fall.

Tennessee: Townsend v. Treadway, Civil Action No. 6500 (U.S. D. Ct., M.D., Tenn.). Decided September 21, 1973.

This was a class action brought February 16, 1972, on behalf of four named resident workers at Clover Bottom Hospital and School and on behalf of all other similarly situated residents.

The defendants in this suit were the Commissioner of the Department of Mental Health for the State of Tennessee, the Assistant Commissioner, the Superintendent of Clover Bottom Hospital and School, and the members of the Board of Trustees for the Department of Mental Health.

The plaintiffs alleged that each member of the class was required to labor and perform services by and for the defendants during the entire term of plaintiffs' residency at Clover Bottom Hospital and School, and that such servitude was involuntary. Plaintiffs submitted that such compulsory and involuntary servitude had been the policy and practice at Clover Bottom at least since 1923. Plaintiffs argued that such servitude constituted peonage in violation of U.S. statutory law and the Thirteenth Amendment's prohibition against slavery. This involuntary servitude was also alleged to have been subject, since 1966, to the coverage of the Fair Labor Standards Act (FLSA). The wage rate paid the plaintiffs, 6-1/4 cents per hour, was alleged to be far below the federally required minimum wage, in violation of the FLSA. Plaintiffs further alleged that defendants failed and continued to fail to withhold retirement and federal insurance contribution taxes on the wages that had been paid and that were being paid to the plaintiffs, in violation of U.S. and Tennessee law.

Plaintiffs requested that the court issue preliminary and permanent injunctions restraining defendants from imposing peonage and involuntary servitude on the plaintiffs, from paying less than a minimum wage under the FLSA, and from continuing to fail to withhold retirement and F.I.C.A. taxes for past and present employment.

Plaintiffs also sought money damages for the violation of their statutory ($5,047,776 plus interest) and constitutional rights, back wages under the FLSA ($3,946,176 plus interest), and the award of reasonable attorneys' fees and costs.

Defendants filed seven separate motions for summary judgment on March 8, which were denied on July 24, 1972. In early March, 1973, the court certified the case as a class action. At the same time the court denied defendants' motion for summary judgment, but ruled that plaintiffs (none of whom were at that time committed to Clover Bottom) lacked standing to seek injunctive relief.

Following the court's ruling, plaintiffs amended their complaint to add a plaintiff who was currently a resident at Clover Bottom, and the suit was then certified as a class action for injunctive as well as other relief. Trial was held on May 15, 1973.

At the beginning of the trial, the court ruled that it lacked jurisdiction to hear the FLSA claim under the recent Supreme Court decision in Employees of the Department of Public Health and Welfare of the State of Missouri (see above). At the close of plaintiffs' evidence, the court also dismissed the money damage action for involuntary servitude. The court ruled that since plaintiffs had sufficient choices as to what work they would do and also had the right to refuse all work, there was no showing of a violation of the Thirteenth Amendment.

In a final order entered on September 21, 1973, the court also denied plaintiffs' request for an injunction. In a lengthy opinion which reviewed the programs and admissions procedures in Tennessee state mental hospitals, including Clover Bottom, the court concluded that there was sufficient evidence to show that even if there were abuses at Clover Bottom in the past, "the likelihood of reversion to any alleged past abusive practices is negligible, and therefore...injunctive relief is not justified and is denied."

The FLSA portion of the case was refiled as Townsend v. Clover Bottom in the Chancery Court, Nashville, Tenn. (see below).

Tennessee: Townsend v. Clover Bottom, No. A-2576 (Chancery Court, Nashville, Tenn.). Denial of defendants' motion to dismiss affirmed, 513 S.W.2d 505 (Tenn. Supreme Court 1974), appeal dismissed and certiorari denied June 9, 1975, 43 U.S.L.W. 3642 (#74-487). Application by state for stay of judgment denied by Mr. Justice Stewart, June 23, 1975.

Following the Federal Court's dismissal of the Fair Labor Standards Act (FLSA) claim on May 15, 1973 (see Townsend v. Treadway above), the plaintiffs refiled that portion of their case in the Tennessee State Chancery Court.

The state filed a motion to dismiss this new suit, primarily on grounds of sovereign immunity. On February 21, 1974, the chancellor denied the defendants' motion to dismiss.

On July 29, 1974, the Tennessee Supreme Court upheld the trial court's ruling that residents of state mental institutions may sue the state in state court to enforce claims under the FLSA. The court rejected the state's claim that it was immune from suits to enforce such claims. It ruled that Congress, in passing the 1966 Amendments to the FLSA (extending coverage to state-run hospitals, etc.) had taken away the state's sovereign immunity from such suits. In so ruling, the court relied on the concurring opinions of United States Supreme Court Justices Marshall and Stewart in Employees of the Department of Public Health and Welfare of the State of Missouri (see above).

In response to the Tennessee Supreme Court's decision, defendants petitioned the United States Supreme Court for certiorari. Certiorari was denied on June 9, 1975.

Wisconsin: Weidenfeller v. Kidulis (U.S. D. Ct., E.D., Wis.), filed August 21, 1974. Order, 380 F. Supp. 445.

This is an action for monetary and declaratory relief by two mentally retarded state nursing home residents who claim they have been required to perform non-therapeutic labor, without compensation, in violation of the Fair Labor Standards Act (FLSA) and the Thirteenth Amendment to the United States Constitution.

In denying defendants' motion to dismiss, the court ruled that the plaintiffs have stated a valid cause of action, based not only on the FLSA and the Thirteenth Amendment, but also based on the constituitonal right to treatment.

A motion for summary judgment by plaintiffs is pending decision.

G. GUARDIANSHIP

Connecticut: Albrecht v. Carlson, No. H-263 (U.S. D. Ct., Conn.), filed December 13, 1973.

Plaintiffs in this class action were two elderly mentally retarded women who were involuntarily committed to mental institutions for 41 years; and a class of "all persons presently or formerly residing in any state institution for the mentally retarded in Connecticut and whose assets or annual income does not exceed...$5000."

The defendant was the Commissioner of the Department of Finance and Control for the State of Connecticut.

Section 4-68(g) of the Connecticut General Statutes provides for the appointment of the commissioner as conservator of the assets for all persons confined in state institutions for the mentally ill or retarded whose assets or income does not exceed $5000. No notice or hearing is required before the conservator is appointed in this capacity. He is authorized to collect funds of the residents and disburse them if he determines it is proper to do so (although under other statues, hearings are required before conservators are appointed).

In their complaint, the named plaintiffs alleged that the defendant disallowed the payment of $320.95 for the purchase of a color television set because the payment "would not be in the best interest of the State of Connecticut," even though the plaintiffs were no longer living in the institution and their social worker and the family with whom they were living felt that the purchase was justified.

The plaintiffs sought to have Section 468(g) of the General Statutes declared unconstitutional on the following grounds:

> The procedure provided permitted plaintiffs to be declared incompetent without notice and a proper judicial hearing in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution, and the procedure created a statutory conflict of interest for the conservator since he had to act in the interest of both the plaintiffs and the state of Connecticut. This conflict violated the Fourteenth Amendment to the United States Constitution;
>
> The procedure discriminatorily applied to only those mentally ill or retarded persons who were confined to state institutions, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, and the statute created "permanent, irrebuttable presumption that plaintiffs and all persons similarly situated were incompetent to handle their own affairs" in violation of the due process and equal protection clauses of the United States Constitution.

The relief sought by plaintiffs in this suit included:

- a declaration that the challenged statutory provision was unconstitutional;
- an injunction prohibiting the defendant from enforcing the statute; and
- an order directing the defendant to return to the plaintiff class all property which had been placed in trustee accounts for them.

The parties entered into a Stipulation of Facts in which they agreed that the challenged statute was unconstitutional in its entirety based on the court's decision in McAuliffe v. Carlson (reported below).

In June, 1974, the court granted plaintiffs' motion for summary judgment and certified the plaintiff class.

Connecticut: McAuliffe v. Carlson, 377 F. Supp. 869 (U.S. D. Ct., Conn. 1974), supplemental decision, 386 F. Supp. 1245 (U.S. D. Ct., Conn. 1975).

In this case, the District Court ruled that the Connecticut statute which provided for the appointment of the state Commissioner of Finance as conservator for the funds of residents of mental institutions whose assets totaled less than $5000 was unconstitutional. (See Albrecht v. Carlson, above.)

The Court ruled that this procedure violated petitioner's right to due process of law because the conservator was appointed without any hearing to determine that the resident was incompetent to manage his own financial affairs. The provision also violated the equal protection clause because other statutes required notice and hearing before a conservator could be appointed for other more affluent or non-institutionalized persons.

On another issue raised by plaintiff, the Court ruled that provisions which required some, but not all prisoners transferred from penal institutions to mental hospitals, to pay for their room and board was a violation of the equal protection clause of the United States Constitution.

Following the declaratory judgment, the state declined to return plaintiff's funds voluntarily. Plaintiff moved for supplemental relief.

The District Court held that the state waived its immunity under the Eleventh Amendment when acting as conservator of plaintiff's social security funds. The court ordered the funds returned, with interest. Plaintiff was also awarded court costs, but was denied attorneys' fees.

Michigan: Schultz v. Borradaile, No. 74-40123 (U.S. D. Ct., E.D., Mich.), filed October 25, 1974.

This class action, brought by a person who had been found incompetent and in need of a guardian of her property and person, challenges the constitutionality of Michigan's guardianship statutes.

Plaintiff claims that the statutes are unconstitutional in that:

1. They are vague and overbroad;

2. They fail to provide adequate notice of the proceedings, a right to counsel, a right to trial by jury, a right to an independent physical and mental examination, a right to a burden of

proof beyond a reasonable doubt, and a right to be present at all hearings;

3. They do not provide the same protection for the allegedly mentally incompetent as do the involuntary civil commitment statutes;

4. They violate the right to privacy.

A three-judge court was convened in this action. Subsequently, on May 5, 1975, this case was consolidated with Tod v. Smith, filed March 18, 1975. Both cases will be heard by the same three-judge panel, and will both be filed under the Schultz file number.

The Tod case essentially raises the same issues as Schultz, but additionally challenges the constitutionality of a new Michigan statute on guardianship of the mentally retarded which became effective August 6, 1975.

It is expected that arguments on the merits of the case will be heard in the fall of 1975.

Pennsylvania: Vecchione v. Wohlgemuth, 377 F. Supp. 1361 (U.S. D. Ct., E.D. Pa. 1974).

The court held that a statute which provided for summary seizure and control of property of mental patients to pay for hospital costs without prior or subsequent notice and hearing violated due process. The statute was also held to violate equal protection, since notice and hearing were required for patients adjudged incompetent yet denied to those not adjudged incompetent.

The court has ordered the Pennsylvania Department of Public Welfare to adopt immediately regulations which will ensure that no patient at a state hospital shall be deprived of any property unless and until he is determined incompetent and a court authorizes such a taking. In addition the court has ordered the defendants to repay $1253 to the named plaintiff and to prepare within 60 days a report which reflects the names of all patients who have had sums from their personal accounts applied to the cost of their maintenance since the date of the court's order holding the seizure statute unconstitutional. Those patients are to be repaid within 90 days.

H. PROTECTION FROM HARM

New York; New York Association for Retarded Children v. Carey.

Reported under Treatment Section.

New York: Rodriguez v. State, 355 N.Y.S.2d 912 (Court of Claims 1974).

A severely retarded resident of Willowbrook State Hospital recovered damages from the state in this case for injuries she received at the

hospital. While recognizing that negligence cannot be presumed from the mere happening of an accident, the court held that under the circumstances, negligence could be inferred, since the child was totally helpless, and the state was charged with the highest standard of care. The court also ruled that the state was responsible whether the mishap was attributable to the attendant or another patient.

Pennsylvania: Janet D. v. Carros, No. 1079-73 (Court of Common Pleas, Allegheny County, Pa.). Decided March 29, 1974.

Plaintiff in this "Petition for rule to show cause why respondent should not be held in contempt" was Janet D., a mentally retarded, emotionally disturbed, deprived child.

The respondent was the Director of Child Welfare Services for Allegheny County.

Plaintiff had been committed by the Juvenile Court to the Child Welfare Services after she had run away from a number of foster homes. On June 15, 1973, the Juvenile Court had entered an order requiring, among other things, that the Child Welfare Services "make suitable arrangements to see that said child does not run away subsequent to her placement in the shelter facility to be provided by C[hild] W[elfare] S[ervices]." Subsequent to the entering of this order, Janet ran away three times and on one occasion was "jumped" by four boys in an attack that had "sexual overtones."

In his opinion, the Juvenile Judge commented that he was "adversely impressed by the CWS administration's general lack of humane concern for children, evidenced by a slavish adherence to rigid bureaucratic channels and a division of work assignments which is perhaps fitting for the Defense Department, but certainly not appropriate for an agency established to help deprived children with individualized problems and needs."

In finding the Director of the Child Welfare Services in contempt, the court held, inter alia;

--That the failure of the Director to properly supervise lower echelon employees in carrying out the court order constituted a contempt of court.

--That neither "good intentions nor poor judgment" are defenses to citations for civil contempt.

The court concluded that it "cannot and will not condone any placement or shelter situation which continually exposes a child to harm regardless of the purity of intentions of those administering the Agency."

The court found the Director in contempt of the court and fined him $100. It also ruled that the plaintiff could file a claim for damages if they could be quantified.

I. STERILIZATION

Alabama: Wyatt v. Aderholt, Three-judge District Court Order January 20, 1973; District Court Order, January 8, 1974.

A three-judge Federal Court issued an order on December 20, 1973, declaring the Alabama involuntary sterilization statute unconstitutional. The court felt that an injunction was "not necessary" because no sterilizations were being performed under the statute. But as an "extreme precaution" to protect the residents of Partlow State School for the Mentally Retarded, the court declared the statute unconstitutional. The three-judge court was then dissolved.

On January 8, 1974, the District Court issued an order promulgating guidelines for "voluntary" sterilizations that might be performed at Partlow. These guidelines require, inter alia, that:

--Sterilization must be in the "best interest" of the resident and may not be done for "institutional convenience." Other less drastic methods of birth control must be considered before sterilization is allowed.

--No one under 21 may be sterilized except in cases of "medical necessity."

--No sterilization may be performed unless there is written consent based on adequate information given by someone competent to consent. If the person to be sterilized is incompetent to give consent, sterilization must not be performed unless approved by the Director of the institution, a Review Committee (constituted to determine the adequacy of consent given) and a court of competent jurisdiction.

--Residents shall be provided counsel in proceedings concerning sterilization.

--No coercion to encourage sterilization shall be permitted.

California: In re Kemp, 43 Cal. App. 3d 758 (Court of Appeals, 1974).

Respondent/appellant is a 32-year-old black woman who was alleged to be mildly mentally retarded.

Petitioner/appellee is her father, who sought to have himself appointed guardian of her person.

The appellant alleged that the "sole purpose" of the petition for guardianship was to "obtain an order of the probate court authorizing her sterilization." The reasons that the doctor and the guardian gave for seeking the sterilization were (1) that she "might engage in sexual intercourse"; and that she was "deficient" and "might have a deficient child."

On December 26, 1972, the trial judge entered an order appointing the father guardian and authorizing and directing him to consent to sterilization of appellant on the grounds that: her health would be impaired if she became pregnant; use of an intrauterine device was medically contraindicated; and use of birth control pills had "adversely affected the health of the appellant."

On appeal, appellant asserted that the Probate Court was without authority to authorize or direct the guardian to consent to her sterilization since its order went beyond the scope of the equitable powers granted to that court when it ordered that the powers of the guardian be exercised for reasons other than the "best interests" of the ward; that the decree of the Probate Court is state action in violation of rights guaranteed to the appellant by the United States and Californa Constitutions, since, among other factors, the sterilization violates the appellant's right to privacy without any compelling state interest; that the sterilization order deprives appellant of equal protection of the laws because she was denied those procedural safeguards which are provided, by statute, to those in institutions who may be sterilized.

The California Court of Appeals unanimously held that the Superior Courts of California lack jurisdiction to order the sterilization of mental incompetents absent express statutory authorization. Although there is express statutory authorization for the sterilization of mental incompetents who are committed to state mental hospitals, no such authorization exists for individuals, like Ms. Kemp, who reside in private nursing homes. Thus, sterilization was not permitted.

District of Columbia: Relf v. Weinberger; National Welfare Rights Organization, et al. v. Weinberger, et al., Civil Action No. 1557-73 and No. 74-372, 372 F. Supp. 1196 (U.S. D. Ct., D.C., 1974).

The Relf case had its genesis in the 1973 sterilization of two young black girls under the auspices of an Office of Economic Opportunity funded family planning program in Alabama. However, the case has grown to include additional plaintiffs and to raise three basic issues: (1) the propriety of sterilizing minors; (2) the propriety of distributing experimental birth control drugs to minors through family planning programs; and (3) whether plaintiffs were coerced into consenting to sterilization.

The suit was originally brought in Alabama under the title Relf v. Montgomery Community Action Committee, Inc., but was dismissed without prejudice and refiled in the District of Columbia as a class action.

The plaintiffs in this suit included Katie Relf, a 17-year-old black girl who alleged that she had been injected with Depo-Provera, an experimental birth control drug. In addition, Ms. Relf alleged that she had had an interuterine device (IUD) implanted. Her two sisters, Minnie Lee and Mary Alice, alleged that in addition to the injection of Depo-Provera, they were forced to undergo a sterilization operation. Mr. Relf was also a plaintiff in this action, as were two women, Mrs. Dorothy Waters and Mrs. Virgil Walker. Mrs. Walker and Mrs. Waters alleged that they had been coerced by a doctor into being sterilized under threat of losing either Medicaid payments relating to delivery services (in Mrs. Waters' case) or welfare aid (in the case of Mrs. Walker). All plaintiffs alleged that these abuses took place pursuant to programs of the Office of Economic Opportunity and the Department of Health, Education, and Welfare. They further alleged that when the sterilizations were first authorized in 1971, there were no guidelines on the procedures to be followed. Guidelines were subsequently developed but never distributed to the family planning programs.

Consistent with the refiling of this suit as a class action, the party plaintiffs claimed to represent a class of poor people who might be subjected to either sterilization or drug experiments and who because of their poverty might not be able to understand the implications of these procedures or who might be especially subject to coercion.

The defendants were Caspar Weinberger, Secretary of Health, Education, and Welfare, and Arnold Arnett, Director of the Office of Economic Opportunity.

The plaintiffs sought a preliminary and permanent injunction against all sterilization until either HEW or the District Court promulgated constitutionally adequate guidelines for sterilizations. Specifically, they asked the court to enjoin the funding of sterilization and to send directives to all family planning programs until guidelines were promulgated that would insure informed consent and would prevent discrimination against poor persons.

On October 2, 1973, argument was heard on a motion by plaintiffs to certify their class action and on a motion by defendants to dismiss.

In an order handed down on October 5, 1973, Judge Gesell denied plaintiffs' motion for certification of the class action and granted defendants' motion to dismiss without prejudice (giving plaintiffs the right to refile their claims when and if it became appropriate). After considering a motion by plaintiffs for reconsideration of the dismissal, the District Court ordered that the suit be reinstated on the narrow

grounds that the HEW guidelines would soon be promulgated, and that the plaintiffs should be allowed to refashion their claims to litigate the adequacy of those regulations once they went into effect.

HEW promulgated sterilization regulations on February 6, 1974. Subsequently a suit was filed by the National Welfare Rights Organization challenging the validity of the regulations under the United States Constitution and certain federal statutes.

According to plaintiffs, the regulations violated the right to privacy of juveniles and persons alleged to be mentally incompetent in that, inter alia, they: (1) sanctioned use of federal funds for sterilization even where there was no "therapeutic purpose"; (2) sanctioned involuntary sterilizations for "therapeutic purposes" without adequate safeguards to insure there was a need for the operation; and (3) sanctioned sterilization over the objection of parents and guardians.

Plaintiffs further alleged that: (1) the regulations sanctioned sterilization of adults on welfare without any procedures to insure that their "consent" to sterilization was "voluntary, informed, and competent"; and (2) the regulations authorized procedures and practices which were beyond the statutory authority of the defendants.

The Relf and NWRO suits were consolidated since they raised similar issues. In order to permit a resolution of the legal issues, the Secretary of HEW agreed to delay implementation of the challenged regulations until March 18, 1973.

Defendants' motion for dismissal and all parties' motions for summary judgment were argued before Judge Gesell of the United States District for the District of Columbia.

Judge Gesell entered his opinion and order on March 15, 1973. The judge avoided deciding the constitutional issues because he determined that the Secretary of HEW lacked statutory authorization to provide federal funds for the "sterilization of any person incompetent under state law to consent to such an operation, whether because of minority or mental deficiency." Accordingly, he enjoined the defendants from providing federal funds for the sterilization of persons who have been "judicially declared mentally incompetent," or who are "in fact legally incompetent under the applicable state laws to give informed and binding consent to the performance of such an operation because of age or mental capacity."

Judge Gesell also found that the consent procedures provided for in the regulations were deficient in that they did not adequately advise persons that benefits under federal programs (principally Medicaid) could not be withheld or withdrawn because of failure to consent to sterilization. He ordered that such advice must "appear prominently at the top of the consent document."

Notices of appeal were filed from the district court's March, 1974, order. Interim regulations were promulgated by HEW in order to comply with the order pending appeal.

On appeal, plaintiffs moved for summary affirmance of the district court order.

Defendants moved for summary affirmance with modification. In their motion, defendants asserted that the HEW regulations had been substantially revised in July, 1974, in order to bring them into compliance with the intent of the district court's decree. The July, 1974, revised regulations had not been implemented, however, since in two respects they conflicted with the district court's decree:

1. The court's order prohibited the use of federal funds for sterilization of persons who are mentally incompetent. The proposed regulations permit sterilization of persons who are mentally incompetent under state law but who are capable of understanding the nature and consequences of sterilization and of forming an intelligent desire to be sterilized;

2. The court order prohibited the use of federal funds for sterilization of minors. The proposed regulations permit the sterilization of persons over the age of 18. In states where persons over 18 are still defined as minors, the proposed regulations prohibit sterilization unless the minor, and also the minor's parents or guardians, if required by state law, have given their knowing and informed consent.

Defendants sought to have the district court's order modified so as to permit implementation of the revised regulations.

On April 18, 1975, the United States Court of Appeals for the District of Columbia denied without prejudice both motions for summary affirmance, and remanded the record to the district court for consideration of the proposed modifications.

Following the remand, plaintiffs alleged that key, uncontested portions of the March, 1974, order were not being adequately enforced. Plaintiffs also opposed modification of the order.

Over objection from HEW, on May 13, 1975, the court ordered full discovery with respect to enforcement of the regulations. The enforcement and modification issues are to be heard together on a yet unscheduled trial date. A status conference has been set for September, 1975.

Missouri: In re M.K.R., 515 S.W.2d 467 (Supreme Ct., Mo. 1974).

This appeal followed a judgment of the juvenile court authorizing sterilization of a mentally deficient female child whose mother had

petitioned the court for approval of sterilization. The appellate court reversed, holding that the juvenile court lacked jurisdiction to deny the child the fundamental right to bear a child. While recognizing that the juvenile code should be liberally construed so as to provide such care as is necessary to the welfare of the child, the court stated:

> "Whatever may be the merits of permanently depriving this child of this right, the juvenile court may not do so without statutory authority--authority which provides guidelines and adequate legal safeguards determined by the people's elected representatives to be necessary after full consideration of the constitutional rights of the individual and the general welfare of the people."

North Carolina: Cox v. Stanton, M.D., et al., Civil Action 800 (U.S. D. Ct., E.D., N.C.).

Plaintiff is Nial Ruth Cox who, when she was 18 years old, was sterilized pursuant to the provisions of a North Carolina statute authorizing sterilization.

The defendants include the doctor who performed the sterilization, the hospital administration, the State Eugenics Board, social workers, and others involved in the sterilization.

Factual Claim. The North Carolina Sterilization Statute authorizes compulsory sterilization of individuals who are determined to be "mentally diseased or feebleminded." Normally, notice and an opportunity to be heard must precede any sterilization order from the State Eugenics Board. However, these safeguards are not required in the case of minors if parental consent is obtained.

Plaintiff alleges that when she was 18 years old, unmarried and pregnant, her physician, Dr. Stanton, "repeatedly threatened" her that her family would lose their welfare benefits because of her "immorality." Under this alleged coercion, plaintiff's mother consented to plaintiff's sterilization.

Plaintiff further alleges that Dr. Stanton petitioned the Eugenics Board for a sterilization order and that the Board granted the order without: (1) holding any hearing; (2) receiving any evidence that plaintiff was "mentally diseased or feebleminded" or that the sterilization would be in the best interest of either the public or the plaintiff; and (3) informing plaintiff or her mother of the order.

Thereupon, Dr. Stanton performed an irreversible sterilization procedure rather than the possibly reversible one provided for in the order. The doctor also submitted reports which referred to the plaintiff as a mentally deficient individual even though no such determination had ever been made.

Plaintiff also alleges that the Eugenics Board has often used this procedure of third-party consent to avoid the hearing requirements of the North Carolina Sterilization Act, and that the law has been discriminatorily applied.

Legal Claim. Plaintiff rests her suit on a number of legal theories:

--Defendant has failed to follow the procedures prescribed in the sterilization statute.

--Common law malpractice was committed since Dr. Stanton performed an operation for which there was no medical need or justification.

--Compulsory sterilization pursuant to the North Carolina statute is a violation of substantive due process of law. There was no rational state interest in compelling the sterilization and it was therefore an arbitrary exercise of state power.

--There was a denial of procedural due process in that there were no safeguards to protect plaintiff's rights in the procedure to obtain a sterilization order from the Eugenics Board. The summary procedure authorized by the statute for minors (entailing parental consent) deprives the minor of the right to be heard in a matter vitally affecting her life--the right to have children.

--The statute is impermissibly vague.

--Compulsory sterilization deprives plaintiff of her right to privacy and the right to control her reproductive functions.

--The statute is applied discrimination against poor people, which violates the equal protection clause of the Fourteenth Amendment.

--The statute violates the Eighth Amendment prohibition of cruel and unusual punishment and operates to punish women who have children out of wedlock.

Relief Sought. Plaintiff requests the following relief:

--A declaratory judgment that the North Carolina sterilization statute is unconstitutional, both on its face and as applied.

--That any references to the "mentally deficient" status of the plaintiff be declared null and void.

--$1,000,000 in monetary damages.

--Reimbursement of attorneys' fees.

Defendants' Answer. In their answer, defendants have raised a number of legal defenses to plaintiff's suit:

--That the plaintiff has failed to state a claim upon which relief may be granted.

--That the action is barred by the statute of limitations.

--That plaintiff may not sue the state because of sovereign immunity and correlatively, that plaintiff failed to follow the procedure of the state tort claims act which provides for a partial waiver of sovereign immunity.

--That plaintiff lacks standing to sue since she is now a resident of the state of New York.

The defendants also assert that the plaintiff has no cause of action because she and her mother "fully, freely, knowingly, and voluntarily requested, petitioned for, and consented to the operation."

The case was dismissed by the District Court on the ground that the statute of limitations had expired. The court ruled that the time for filing suit began to run when the injury occurred. Plaintiff has appealed, arguing that the time for filing should not have begun to run until the injury was discovered. Thus, the complaint was filed within the time allotted by the statute of limitations. The case is now pending in the Fourth Circuit.

North Carolina: Trent v. Wright (U.S. D. Ct., E.D., N.C.), filed January 18, 1974.

Plaintiff is a young black woman who was irreversibly sterilized at age 14. She claims to represent a class of persons who have been or might be subjected to this same procedure. Defendants include the doctor who performed the operation and certain social service personnel and members of the State Eugenics Board who either recommended or authorized the operation.

Plaintiff alleges that:

1. When she was 14 years old, she gave birth to an illegitimate child. While she was in the hospital, she was sterilized after the doctors had obtained written consent from her illiterate grandmother.

2. Her grandmother did not understand what was on the form and was told by the doctors that the procedure would only be temporary. The defendant Eugenics Board authorized the sterilization without holding a hearing to determine whether or not plaintiff was "mentally diseased or feebleminded" (the standard for involuntary

sterilization under North Carolina law), which she was not.

3. That the Eugenics Board has increasingly relied on third-party consent to the operation of sterilization in order to avoid the hearing procedures required by the sterilization statute. The Eugenics Board's determination was based on factors of race, sex, poverty and her status as an unwed mother.

5. The sterilization operation has resulted in physical disabilities and her husband has said he plans to leave her based largely on her inability to bear him any children.

6. The defendants have violated the provisions of the North Carolina sterilization statutes in the method by which they ordered sterilization, and the defendants' conduct amounts to medical malpractice.

Plaintiff seeks the following relief:

1. A declaration that the sterilization statute is in violation of the United States Constitution;

2. Nullification of the Eugenics Board's determination that the plaintiff was "mentally defective";

3. An order to expunge reference to the "mentally defective" condition of the plaintiff from all records;

4. Monetary damages; and

5. Costs and attorneys' fees.

The parties have agreed to await a decision in Cox v. Stanton (see above) before proceeding with the litigation.

Wisconsin: In re Mary Louise Anderson, (Dane County Court, Branch I, Wis.). Decided November, 1974.

The father of a mentally retarded 19-year-old woman, who was also her temporary guardian, petitioned the court for an order authorizing him to consent to her sterilization.

Testimony in support of the sterilization was received from the ward and both her parents. A consent to sterilization signed by the ward, and certifications from two physicians and a Ph.D. supporting sterilization were also filed with the court.

At a subsequent proceeding, the guardian ad litem made an oral report in opposition to the petition.

The court denied the petition to consent to sterilization, holding:

1. It was totally correct for the temporary guardian to petition the court, since regardless of the medical necessity that may be involved or what may be perceived as the best interests of the ward, authorization to sterilize should only come from a court after a full evidentiary hearing.

2. Before sterilization should be authorized, a court must be satisfied:

a, That the procedure is a medical necessity or in the best interest of the ward;

b. That all the less drastic alternatives have been investigated; and

c. That all the less drastic alternatives are unsuitable.

3. Although there was evidence that sterilization was in the best interests of the ward, the guardian ad litem disagreed. Any doubts about such matters should be resolved against sterilization.

4. There were less drastic alternatives which should have been explored by the guardian.

J. TREATMENT

Alabama; Wyatt v. Hardin,[1/] (formerly Wyatt v. Stickney), 325 F. Supp. 781 (M.D. Ala. 1971), 344 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373, 387 (M.D. Ala. 1972), aff'd in part, modified in part sub nom. Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

This litigation originally pertained only to Alabama's mentally ill. It began in September, 1970, when a budget deficit forced the head of the state Mental Health Department, Dr. Stonewall B. Stickney, to sever a number of employees at Bryce Hospital, one of Alabama's two large mental hospitals. The employees filed suit against the Mental Health Commissioners and Hospital Administrators in Federal District Court protesting their severance without notice or hearing, and alleging that the lay-off threatened the quality of care at Bryce and denied patients their constitutional right to treatment. Ultimately, the professionals found good positions elsewhere, and the controlling issue became the patients' claim to adequate treatment.

1/ The name of Hardin has been substituted for Aderholt and Stickney, whom he has succeeded as Commissioner of Mental Health.

On March 12, 1971, in a formal opinion and decree, Judge Johnson held that the patients involuntarily committed to Bryce Hospital because of mental illness were being deprived of the constitutional right "to receive such individual treatment as [would] give each of them a realistic opportunity to be cured or to improve his or her mental condition." Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971). The court gave defendants six months in which to bring treatment at Bryce up to constitutional standards and required them to file a report on their progress. By motion to amend, granted August 12, 1971, plaintiffs expanded their class to include residents at the other state mental institution and also at Partlow State School and Hospital, a public institution located in Tuscaloosa, Alabama, and designed to habilitate the mentally retarded.

In his order of March 12, Judge Johnson invited the United States to participate in this case as amicus curiae (friend of the court). Subsequently, the court also granted leave to the American Psychological Association, the American Orthopsychiatric Association, the American Civil Liberties Union, and the American Association on Mental Deficiency to intervene to serve as amici and to provide expert assistance. The court granted amici in this case the extraordinary opportunity to participate fully in the proceedings, i.e., to present expert witnesses of their own and to cross-examine the witnesses of other participants in open hearing.

On December 10, 1971, based in part upon a review of defendants' six-month progress report, the court found that defendants had failed to promulgate and effectuate minimum standards for adequate treatment and called for a hearing to set objectively measurable and enforceable standards for minimum adequate treatment and adequate habilitation. Wyatt v. Stickney, 344 F. Supp. 1341 (M.D. Ala. 1971).

In preparation for this hearing, plaintiffs and amici toured the Partlow institution in Tuscaloosa with a team of experts, presented testimony on conditions presently existing at Partlow, formulated standards for constitutionally adequate habilitation, and made proposals concerning implementation. Prior to the ordered hearing, plaintiffs, defendants, and amici met to discuss a number of proposed standards and entered into a series of stipulations which were presented to the court for approval.

A three-day hearing on the mental retardation aspects of this case was held in late February. At the close of the testimony the court, having in its own words "been impressed by the urgency of the situation," issued an emergency order "to protect the lives and well-being of the residents of Partlow." In that order, the court found that:

> "The evidence has vividly and undisputedly portrayed Partlow State School and Hospital as a warehousing institution which, because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing habilitation to the

mentally retarded and is conducive only to the deterioration and the debilitation of the residents. The evidence has reflected further that safety and sanitary conditions at Partlow are substandard to the point of endangering the health and lives of those residing there, that the wards are grossly understaffed, rendering even simple custodial care impossible, and that overcrowding remains a dangerous problem often leading to serious accidents, some of which have resulted in deaths of residents." Wyatt v. Stickney, March 2, 1972, unpublished Interim Emergency Order.

The Interim Emergency Order required the state to bring Partlow up to standards which would at least protect the physical safety of its residents. For example, the Order required that immediate changes be implemented to make the buildings fire-safe and to control the distribution of drugs. The court also ordered the state to hire 300 new aide-level employees within 30 days. Judge Johnson ordered the state to disregard Civil Service requirements, or "any other formal procedure" that would delay the hiring. Within 10 days after the Order was made public, more than 1,000 persons had applied for jobs, and the quota was met.

A final order and opinion setting standards for miminum constitutionally and medically adequate treatment, and establishing a detailed procedure for implementation, was handed down on April 13, 1972. These standards include, inter alia, a provision against institutional peonage; a number of protections to insure a humane psychological environment; minimum staffing standards; detailed physical standards; minimum nutritional requirements; provision for individualized evaluations of residents, habilitation plans and programs; a provision to ensure that residents released from Partlow will be provided with appropriate transitional care; and a requirement that every mentally retarded person has a right to the least restrictive setting necessary for habilitation. The judge also appointed a seven-member "human rights committee" for Partlow, and included a patient on this committee. The human rights committee "will have review of all research proposals and all rehabilitation programs to insure that the dignity and human rights of patients are preserved." It will also advise and assist patients who allege that their legal rights have been infringed or that the mental health board has failed to comply with judicially ordered guidelines.

The court further ordered that a professionally qualified and experienced administrator be hired to serve Partlow State School and Hospital on a permanent basis within 60 days. It further ordered that within six months from the date of the opinion, the state prepare and file with the court a report reflecting in detail the progress on its implementation. The court also ruled that reasonable attorneys' fees for plaintiffs' lawyers would be awarded and taxed against the defendants and stated that a ruling on plaintiffs' motion for further relief, including the appointment of a master, would be reserved for the future.

The mental retardation part of the District Court's Wyatt opinion contains 49 individual standards or guidelines.

On May 12, 1972, the Alabama Mental Health Board and George Wallace, individually, filed a notice of appeal in this case in the U.S. Court of Appeals for the Fifth Curcuit; on May 22, 1972, Defendant Wallace, individually, filed a motion for stay of execution of the District Court's decree pending appeal and a motion for order of modification. On June 26, 1972, the district court denied the motion, noting that "the appeal seems frivolous." Subsequently, on August 14, 1972, the Court of Appeals for the Fifth Circuit ordered the appeal expedited.

On November 8, 1974, after a delay of over 23 months, the United States Court of Appeals for the Fifth Circuit, in a unanimous panel opinion written by Judge Wisdom, held that the Constitution guarantees persons civilly committed to state mental institutions a right to treatment.

The Mental Health Board and the Governor of Alabama (defendants in the District Court) had advanced six major contentions on appeal of the District Court's decision. They contended: (1) that the District Court erred in holding that civilly committed mental patients have a constitutional right to treatment; (2) that the court lacked jurisdiction because the suit was in effect a suit against the state proscribed by the Eleventh Amendment; (3) that the case involved rights and duties not susceptible to determination by judicially ascertainable and manageable standards, and therefore presented a non-justiciable controversy; (4) that the order of the District Court invaded a province of decision-making exclusively reserved to the state legislature; (5) that the plaintiffs were not entitled to equitable relief because they had adequate remedies at law to protect the rights there asserted; and (6) that the District Court erred in awarding plaintiffs reasonable attorneys' fees.

According to the Fifth Circuit, the basic legal contention in the Wyatt case was largely foreclosed by its recent decision in Donaldson v. O'Connor, 493 F.2d 507 (1974).

The Fifth Circuit in the Wyatt opinion briefly summarized Donaldson as follows:

> "In Donaldson, we held that civilly committed mental patients have a constitutional right to such individual treatment as will help each of them to be cured or to improve his or her mental condition. We reasoned that the only permissible justifications for civil commitment, and for the massive abridgements of constitutionally protected liberties it entails, were the danger posed by the individual committed to himself or to others, or the individual's need

for treatment and care. We held that where the justification for commitment was treatment, it offended the fundamentals of due process if treatment were not in fact provided; and we held that where the justification was the danger to self or to others, then treatment had to be provided as the quid pro quo society has to pay as the price of the extra safety it derived from the denial of individuals' liberty."

The Fifth Circuit opinion in Wyatt notes, however, that Governor Wallace made one argument not answered by the discussion in Donaldson. Governor Wallace challenged the assumption that the only permissible justifications for confinement are danger to self or others or need for treatment. Instead, the Governor suggested that the principal justification for commitment lies in the inability of the mentally ill and the mentally retarded to care for themselves, and that the families and friends of the disabled were "the true clients" of the institutional system. Obviously, if "need for care" is a justification for commitment, then it follows that the mere provision of custodial care is constitutionally adequate to justify continued confinement. However, after noting that the "kind of care that was provided at the Alabama hospitals was insufficient even to meet this more limited standard of 'adequate care'," the Fifth Curcuit went on to reject the underlying premise that the need to care for the mentally handicapped -- and to relieve their families, friends or guardians of the burden of providing care --supplies a constitutional justification for civil commitment. According to the Court:

"At stake in the civil commitment context, as we emphasized in Donaldson, are 'massive curtailments' of individual liberty. Against the sweeping personal interests involved, Governor Wallace would have us weigh the state's interest, and the interests of the friends and families of the mentally handicapped in having private parties relieved of the 'burden' of caring for the mentally ill. The state interest thus asserted may be, stricly speaking, a 'rational' state interest. But we find it so trivial beside the major personal interests against which it is to be weighed that we cannot possibly accept it as a justification for the deprivations of liberty involved.

* * *

"...our express holding in Donaldson and here rests on the quid pro quo concept of 'rehabilitative treatment, or, where rehabilitation is impossible, minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary.'"

In addition to upholding the constitutional right to treatment, the Court of Appeals held that the suit was not barred by the Eleventh

Amendment; that the right to treatment could be implemented through judicially manageable standards; that the granting of relief did not invade a province of decision-making exclusively reserved for the state legislature; and that legal remedies such as individual habeas petitions or damage actions (as opposed to class action injunctive relief) were not adequate to solve the problem.

In holding that individual suits by mental patients would be inappropriate to assure in advance that mental patients will "at least have the chance to receive adequate treatment by proscribing the maintenance of conditions that foredoom all mental patients inevitably to inadequate mental treatment," the Fifth Circuit stressed that:

> "...mental patients are particularly unlikely to be aware of their legal rights. They are likely to have especially limited access to legal assistance. Individual suits may be protracted and expensive, and individual mental patients may therefore be deterred from bringing them. And individual suits may produce distorted therapeutic effects within an institution, since staff may tend to give especially good -- or especially harsh -- treatment to patients the staff expects or knows to be litigious."

Three issues of great concern were left undecided by the court. First, the parties and amici had stipulated to a number of specific conditions which they agreed were necessary for a constitutionally acceptable minimum treatment program. But since these stipulations were not appealed by the state of Alabama, the Fifth Circuit did not need to and did not reach a decision as to whether the standards prescribed by the District Court were constitutionally minimum requirements. It should be noted that although the Fifth Circuit did not offer an opinion as to whether the specific Wyatt District Court standards are constitutionally required, it did unequivocably reaffirm its opinion, expressed in Donaldson, that the "right to treatment can be implemented through judicially manageable standards."

Secondly, the District Court had issued an opinion fixing the amount of attorneys' fees due to plaintiffs from the defendant state at $36,744.62, and the state of Alabama had appealed the District Court's decision to award attorneys' fees. The Fifth Circuit reserved decision on this issue pending decisions in two other attorneys' fees cases which had been argued and submitted to the full court in October, 1974.

Finally, the Fifth Circuit declined to adjudicate "unnecessarily and prematurely" possible serious constitutional questions presented by federal judicial action ordering the sale of state lands, or altering the state budget, or which might otherwise arise in the problem of financing. The Fifth Circuit held that determination of good faith efforts by state authorities to insure the constitutional right to treatment should be made in the first instance by the District Court,

and remanded the case to the District Court on relief issues. It did, however, hold that as a jurisdictional matter dictated by federal statute, remedies of the type contemplated in previous District Court orders (e.g., sale of state lands, or altering the state budget) are required to be determined by a District Court of three judges.

The defendants in Wyatt decided not to appeal the Fifth Circuit's decision to the United States Supreme Court; thus the Wyatt decision now stands as a final decree.

As part of the District Court's continued monitoring of its decision, the court has taken two actions in relation to Standard Nine of its April, 1972 order, which prohibited use in state mental hospitals of electro-convulsive therapy, aversive conditioning and other unusual or hazardous procedures unless the patient had given express and informed consent:

1. The Searcy (Hospital) Human Rights Committee, in September, 1974, urged the court to amend Standard Nine for the purpose of providing greater flexibility in administration of ECT. The court asked amici to submit proposed revisions.

On February 28, 1975, the court revised Standard Nine by an order which (a) prohibits all psychosurgery and similar surgical procedures; (b) allows ECT only in the cases of persons eighteen or older and only in accordance with specific standards and procedures which would govern the qualifications of those recommending and administering ECT, would assure the fully informed and voluntary character of consent, would provide for appointed counsel and an opportunity to consult with an independent expert, would require advance approval by a multi-disciplinary "outside" Extraordinary Treatment Committee, and would afford persons competent to give consent an absolute right of refusal and provide added safeguards in the cases of those who are incompetent; and (c) allows aversive conditioning to be used only in accordance with procedures generally equivalent to those proposed for ECT.

The order flatly prohibits aversive conditioning when competent consent is unattainable. This is the major substantive respect in which the court's order differs from the standards submitted by the amici professional organizations. The professional organizations have filed a motion to amend the order to allow aversive conditioning to be administered to incompetent patients upon Extraordinary Treatment Committee approval of the treatment as being clearly in the patient's best interests.

While technically, these standards apply only to Alabama's institutions for the mentally ill, they are reported here because of their precedential value and the likelihood that the court may in the future apply them to Partlow School for the Retarded as well.

2. At Bryce Hospital between April, 1972, and May, 1974, several patients were subjected to ECT in violation of Standard Nine. A December, 1974, hospital-policy directive that conflicted with Standard Nine was in effect while most series of ECT were administered. On February 28, 1975, a hearing was held to determine whether a staff physician, two psychiatrists and the hospital director should be held in contempt for violations of the court order. On June 26, 1975, the court decided against holding these defendants guilty of contempt.

California: Revels, et al. v. Brian, M.D., et al., No. 658-044 (Superior Ct., San Francisco), filed March 22, 1973.

This class action presented the novel issue of whether mentally retarded citizens are denied a state or federal right to habilitation when state officials allegedly plan to close certain state institutions for the mentally retarded.

Plaintiffs alleged that state officials were planning to phase out and close all hospital facilities for the mentally retarded in the state without planning to substitute other programs that were equal to or superior to those in existence.

Plaintiffs asserted that they had a fundamental right to receive a minimally acceptable level of care from the state which they defined as "substantial compliance with Standards for Residential Facilities for the Mentally Retarded" promulgated by the Joint Commission on the Accreditation of Hospitals. They alleged that they would be denied this right if the closure of the hospitals took place. Plaintiffs' legal theory was that since the state provides services for "normal citizens," elimination of treatment for mentally retarded citizens would arbitrarily discriminate against them in violation of the equal protection provisions of the U.S. and California Constitutions.

Plaintiffs sought declaratory and injunctive relief.

While the litigation was pending, the California legislature passed A.B. 855 over the Governor's veto. This legislation provided that no state hospital can be closed without the approval of the legislature. Since this bill granted the same relief sought by plaintiffs in this suit, the case was dismissed pursuant to the following conditons:

1. That the suit would be expressly dismissed without prejudice, meaning that plaintiffs would not be precluded from refiling it if necessary.

2. That no notice to class members was required at the time of dismissal.

3. That any statute of limitations with regard to plaintiffs' claims would be deemed tolled on the date of the filing of the

complaints in this case. Thus, further actions would not be barred by the running of the limitations period.

The suit is currently dormant, pending implementation of A.B. 855.

District of Columbia: Dixon v. Weinberger,[1] No. CA 74-285 (U.S. D. Ct., D.C.), filed February 14, 1974.

Plaintiffs in this class action originally included a class of persons confined to St. Elizabeths Hospital in the District of Columbia who "now, or may in the future, need placement in the least restrictive setting, consistent with suitable care and treatment...," and four prestigious organizations of mental health professionals -- The American Orthopsychiatric Association, American Psychiatric Association, American Psychological Association and the American Public Health Association.

Defendants are the Federal and District of Columbia officials who are responsible for operating St. Elizabeths Hospital in the District.

The plaintiffs allege in the complaint that the defendants have a duty under the 1964 Hospitalization of the Mentally Ill Act and the First, Fifth and Eighth Amendments to the U.S. Constitution, to "return the mentally ill [and retarded] to a full, productive and autonomous life in the community as soon as possible." To this end, they have a duty to place these persons in the "least restrictive settings or institutions consistent with the plaintiffs' treatment needs." If these settings do not already exist, defendants have a duty to create these settings and further to upgrade the existing facilities to insure that they benefit and not harm the plaintiffs.

The plaintiffs further allege that all of the named plaintiffs and the members of the class should no longer be confined to St. Elizabeths Hospital but cannot be placed in alternative settings because those settings do not exist in sufficient numbers to meet the requirements of those who need them.

Plaintiffs have sought the following relief:

--A declaration that the defendants are in violation of the 1974 Hospitalization of the Mentally Ill Act and the United States Constitution because of their failure to provide treatment in less restrictive settings than St. Elizabeths Hospital;

--An order enjoining the defendants from violating their duty to provide treatment in less restrictive settings and requiring the defendants to submit to the court a plan to provide such treatment; and attorneys fees and costs.

1/ Formerly Robinson v. Weinberger.

In May, 1974, defendants moved to dismiss the suit, contending, inter alia, that involuntarily confined patients did not have a right to suitable treatment in less restrictive alternative facilities. Plaintiffs submitted briefs in opposition in June. On January 19, 1975, the District Court heard oral argument on the pleadings, and rejected defendants' arguments that they had neither the authority nor duty to assure that committed patients are placed in less restrictive alternatives. At the same time the court ruled that the would-be organizational plaintiffs -- American Orthopsychiatric Association, American Psychiatric Association, National Association for Mental Health and American Public Health Association -- did not have standing to sue. The nine named plaintiffs have filed a motion for summary judgment, which is pending decision.

Florida: O'Connor v. Donaldson.

For a discussion of the Supreme Court's recent decision, see FEATURE at page 1.

Georgia: Burnham v. Department of Public Health of the State of Georgia, 349 F. Supp. 1335 (N.D. Ga. 1972), 503 F.2d 1319 (5th Cir. 1974), cert. denied, ___ U.S. ___, 43 U.S.L.W. 3682 (1975).

This Wyatt-type class action was filed March 29, 1972. Plaintiffs are or have been patients at one of six institutions for the mentally retarded or mentally ill under the auspices of the Public Health Department for the state of Georgia.

Defendants are various state officials responsible for the operation of the institutions, as well as the judges who are authorized to commit a person for involuntary hospitalization.

On August 3, 1972, District Court Judge Sidney Smith granted defendants' motion to dismiss. While Judge Smith recognized that there may be a moral right to treatment, he ruled that such a right has no constitutional underpinnings.

Plaintiffs appealed the court's decision. The case was consolidated with Wyatt, and was subsequently reversed and remanded in accordance with Wyatt.

Defendants' petition for certiorari to the United States Supreme Court has been denied.

Hawaii: Gross, et al. v. State of Hawaii, No. 43090 (Circuit Court, First Circuit, Hawaii).

This is a Wyatt-type class action on behalf of mentally retarded citizens of the state of Hawaii.

Plaintiffs seek declaratory and injunctive relief.

The case is presently in the discovery stage.

Illinois: Nathan v. Levitt, No. 74 CH 4080 (Circuit Ct., Cook County, Ill.). Consent Order, March 26, 1975.

Plaintiffs in this class action suit were institutionalized mentally retarded persons in the state of Illinois.

Defendants were the state officials responsible for the operation of state mental health treatment facilities.

Plaintiffs claimed that defendants, in violation of the commands of the Illinois Mental Health Code and Illinois Constitution, had failed to provide "comprehensive and individualized" rehabilitation plans for mentally retarded residents of state institutions.

On March 26, 1975, the court entered a consent order. The court's decree ordered implementation of various provisions with respect to testing and evaluation, placement and treatment, and staff training.

The testing and evaluation provisions require inter alia that:

> All persons confined in, or seeking admission to, state facilities for the mentally ill, who are also diagnosed as mentally retarded, shall be referred to a testing and diagnostic facility for a comprehensive evaluation covering physical, emotional, social, and cognitive factors.

The placement and treatment provisions require inter alia:

> 1. Degrees of retardation shall be defined in accordance with the definitions in the Manual on Terminology and Classification in Mental Retardation (1973 edition), published by the American Association on Mental Deficiency.
>
> 2. All persons diagnosed as severely or profoundly mentally retarded who are currently on wards for the mentally ill shall be transferred immediately to facilities or units equipped to treat mental retardation. The transfers are to be completed no later than thirty days from the date of diagnosis.
>
> 3. All persons diagnosed as both severely or profoundly mentally retarded and mentally ill shall be placed in a facility for the mentally retarded on a special unit which treats such persons. Persons currently residing on wards for the mentally ill shall be transferred immediately, unless special clinical reasons exist for a delay. If delay is warranted, transfer must be accomplished

within thirty days from the date of the court's order, and the reasons for delay must be noted in the patient's record.

4. With respect to persons diagnosed as solely mildly or moderately mentally retarded, the Department of Mental Health and Developmental Disabilities (DMHDD) shall recommend services from or placement in a community which will meet the patient's needs. The DMHDD shall give assistance in effectuating the provision of services.

5. With respect to persons diagnosed as both mentally ill and either mildly or moderately retarded:

a. The testing facility shall investigate all less restrictive alternatives to hospitalization. Referrals shall be made to appropriate settings outside the hospital and assistance given to effectuate provision of services.

b. If all alternatives to hospitalization prove unsuitable, the persons shall be placed in an appropriate treatment program. All attempts to place a person and the results of such attempts shall be noted in the patient's record.

c. If the person is placed on a unit for the mentally ill, a treatment plan shall be formulated by an inter-disciplinary team composed of professionals in both mental retardation and mental illness. An initial treatment plan, which documents the person's physical and mental condition at admission and his needs for further testing and evaluation, must be prepared within 72 hours of admission.

A detailed revised treatment plan must be prepared within 14 days. That plan must include: a detailed description of the patient's conditon and needs, a detailed description of the recommended treatment, a list of persons responsible for implementing the treatment, a statement of the need for vocational instruction and a plan for such instruction, a description of required educational instruction, a concise statement of treatment goals and a projected timetable for their attainment, a description of the relationship between elements of the treatment plan and the treatment goals, a plan for involvement in treatment of persons from the patient's normal environment, and the signed approval of a mental health professional.

The treatment plan shall be reviewed and updated monthly.

Each plan shall specify the appropriate treatment for both the mental retardation and the mental illness, and whether they are to be treated simultaneously or separately.

d. The DMHDD shall provide an adequate number of qualified staff to implement the plan.

e. Residents who are under 17 years of age shall not be housed with older patients except as provided by statute.

The training provisions require that mental health professionals assigned to intake units participate in an organized continuing training program on the subject of recognition and treatment of mental retardation.

The court has retained jurisdiction of the case and has imposed various reporting requirements in order to monitor implementation of the order.

Illinois: Rivera, et al. v. Weaver, et al., Civil Action No. 72C135.

In this class action plaintiffs sought a declaration that defendants, acting under the color of state law, had deprived and continued to deprive plaintiffs of due process of law by causing them to be transferred to and confined within institutions for the mentally ill and mentally retarded in violation of their constitutional right to adequate placement, care, custody, protection and treatment.

The named plaintiffs (one of whom is mentally retarded) were all juveniles under 18 years of age who continuously resided in Cooke County prior to their transfers to the Elgin State, Chicago-Read, and Tinley Park mental instituitons. Each named plaintiff was in the permanent or temporary custody of the Illinois Department of Children and Family Services, and allegedly was subject to the right and duty of that agency to procure for him proper placement, custody and treatment.

The defendants in this action were the Director of the Illinois Department of Children and Family Services; the Director of the Chicago Region of the Illinois Department of Children and Family Services; and the Guardianship Administrator of the Department of Children and Family Services for the state of Illinois.

The complaint alleged that plaintiffs, who suffered from emotional disorders, should be discharged from the institutions for the mentally ill and mentally retarded, since their disorders were not so severe as to require hospitalization, but only special care and attention. The plaintiffs sought to have the acts and omissions by the defendants, which had deprived plaintiffs of an adequate level of care, treatment and custody, declared to be in violation of their right not to be institutionalized without due process of law. The plaintiffs further sought an injunction prohibiting defendants from confining plaintiffs and the class they represented in mental institutions unless they were in need of hospitalization.

Plaintiffs in this case dismissed their complaint since virtually the the same relief sought was obtained in state court in the case of In the Interest of Mary Lee and Pamela Wesley, Nos. 68 J (D) 1362, 66 J (D) 6383, 68 J 15805 (Circuit Ct., Cook County). A comprehensive August, 1972, order gave institutionalized children who were wards of the state the right to leave the institutions, and further affirmed the state's responsibility to secure placement for them. An elaborate system of reporting was set up and the plaintiffs' lawyers were appointed as child advocates for 200 children.

Illinois: Wheeler, et al. v. Glass, et al., 473 F.2d 983 (7th Cir. 1973).

On November 13, 1970, two mentally retarded youths institutionalized at Elgin State Hospital, filed in Federal District Court a class action complaint pursuant to the Civil Rights Act (42 U.S.C. 1983) seeking declaratory, injunctive, and pecuniary relief for violations of their constitutional rights. The complaint alleged that the defendants by summarily and publicly binding plaintiffs in spread-eagled fashion to their beds for 77-1/2 consecutive hours and forcing them to wash walls for over 10 consecutive hours on more than one occasion in order to punish and humiliate them, subjected plaintffs to cruel and unusual punishment and denied them due process of law.

The defendants in this case were the Director of the Department of Mental Health of the State of Illinois, the Acting Executive Director of the Children's and Adolescent Unit, and the Acting Program Coordinator of Halloran West Ward, Elgin State Hospital.

On November 17, 1970, plaintiffs filed a motion for a temporary restraining order and preliminary injunction. On May 4, 1971, and May 7, 1971, defendants filed a motion to dismiss and memorandum in support thereof, respectively, asserting that their revised rules on the use of restraint corrected the alleged abuses and thus rendered the lawsuit moot. The District Court filed a memorandum opinion on August 2, 1971, granting the defendants' motion to dismiss the complaint. Plaintiffs were granted leave to appeal in forma pauperis on August 11, 1971.

The plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit. The plaintiffs did not appeal from the refusal of the court to grant an injunction inasmuch as the defendants did, in fact, enforce a revised rule governing the use of restraints. Plaintiffs, however, did appeal the dismissal of that portion of the complaint requesting monetary damages. The appeal brief argued that the punishment perpetrated by the defendants upon the plaintiffs without notice and hearing violated the plaintiffs' rights to be free from cruel and unusual punishment and to due process of law, thus entitling them to monetary compensation for the damages they sustained.

On January 18, 1973, the Court of Appeals held that the plaintiffs' complaint for pecuniary damages did state a cause of action under the Civil Rights Act--thus reversing the District Court's finding.

Following a five-day jury trial in July 1974, plaintiffs were awarded $6000 in damages, plus attorneys' fees. In a post-trial motion one of the defendants, a doctor for one of the state institutions, claimed that he was denied effective assistance of counsel in his representation by the Attorney General's office because of an alleged conflict of interest. Only that defendant took an appeal to the Seventh Circuit Court of Appeals, and he dismissed his appeal on September 24, 1975.

The judgments, attorneys' fees and costs have all been paid.

Maryland: Maryland Association for Retarded Children v. Solomon, No. N-74-288 (U.S. D. Ct., Md.).

This is a Wyatt-type class action suit brought on behalf of all persons who are now or who may become residents of Henryton Hospital Center, a Maryland institution for the mentally retarded.

Plaintiffs seek declaratory and injunctive relief.

Under an informal agreement, no answer or other responsive pleading has yet been filed by defendants.

Maryland: United States v. Solomon, No. N-74-181 (U.S. D. Ct., Md.), filed February 21, 1974.

Plaintiff in this Wyatt-type right to treatment suit is the United States of America, represented by the Department of Justice, Civil Rights Division, Office of Institutions and Facilities. This was the first instance in which the U.S. Department of Justice itself initiated (rather than participated in as a friend of the court) a class action suit on behalf of the mentally retarded.

Defendants are the officials who operate Rosewood State Hospital in Maryland and officials of the Department of Health and Mental Hygiene of Maryland.

The case is in a pretrial stage.

Massachusetts: Ricci, et al. v. Greenblatt, et al., Civil Action No. 72-469F (U.S. D. Ct., Mass.). Consent Decree, November 12, 1973.

This Wyatt-type class action was brought on behalf of a number of named plaintiffs, all of whom resided at Belchertown State School, other persons similarly situated, and the Massachusetts Association for Retarded Children. The defendants in this case were the Secretary of

Human Services, the Commissioner of Administration, the Commissioner of the Department of Mental Health, the Superintendent of Belchertown State School, and other officials of the State of Massachusetts.

On November 12, 1973, the parties entered into a consent decree which was approved by the court. Some of the more important provisions of the decree included the following:

--The defendants agreed to take steps to renovate the physical plant at Belchertown State School. One of these was to request an appropriation of $2.6 million for renovation and improvement of various buildings. The defendants also agreed to consult with the plaintiffs about the renovation plans as they are made.

--The defendants agreed to increase the size of the staff at Belchertown. In particular, they agreed to hire an additional 36 professional staff personnel including therapists (physical, occupational, speech), psychologists, social workers, teachers and counsellors. They also agreed to expedite the hiring of these personnel even if it meant circumventing normal civil service procedures.

--Defendants also agreed to provide program capacity for 75 retarded citizens in community residences and day programs.

Michigan: Jobes, et al. v. Michigan Department of Mental Health, No. 74-004-130 DC (Cir. Ct., Wayne County, Mich.), filed February 19, 1975.

Named plaintiffs in this class action are Jane Doe, a seven-year-old child, committed as mentally ill to the Lafayette Clinic in Michigan, her attorney, and the Medical Committee for Human Rights.

Defendants are various officials and personnel responsible for accepting children into state mental health facilities and for medical experimentation at the facilities.

Plaintiffs, by petitioning the court for writs of habeas corpus, seek to enjoin experimentation on children in Michigan mental health facilities. Plaintiffs allege that children in state mental health facilities are subjected to medical experimentation, including a zinc study and a C-14 Triptophan study at the Lafayette Clinic, without their consent and without judicial review. Plaintiffs also allege that consent to experimentation by parents or other legal guardians is obtained without full disclosure of the experiments and methods involved, the duration and purpose of those experiments, possible present or future side effects, and the benefits, if any, to the children being used as subjects, other than the promise of accompanying treatment at the facilities where they are institutionalized.

Plaintiffs also seek to obtain public access to all documents in Wayne County, Michigan, pertaining to medical experimentation involving children at state mental health facilities.

In addition, plaintiffs challenge as unconstitutional Michigan laws which permit the commitment of children to mental health facilities on the written agreement of their parents or guardians and the receiving mental health facility, without civil commitment proceedings and without the legally valid consent of the child. Plaintiffs seek the release of all children committed pursuant to such laws.

Discovery is proceeding. Defendants, however, have filed a motion for a protective order to prohibit plaintiffs from questioning the Director of the Michigan Department of Mental Health with respect to (1) institutionalization and treatment of retarded children; (2) the use of medication in state mental health facilities; and (3) aversive conditioning. Defendants allege that such questions exceed the scope of the complaint.

Minnesota: Welsch v. Likins, 373 F. Supp. 485 (U.S. D. Ct., Minn. 1974).

This Wyatt-type class action was brought on behalf of residents at six state hospitals for the mentally retarded in Minnesota.

The case went to trial on September 24, 1973, before Judge Earl Larson of the United States District Court for the Fourth Division of Minnesota. The trial, which lasted a full two weeks, focused exclusively on Cambridge State Hospital, one of the six state institutions sued.

Following the trial the court personally toured Cambridge State Hospital.

On February 15, 1974, the court issued a decree and 23-page legal memorandum which affirmed a constitutional due process right to habilitation for persons who are involuntarily committed to state facilities for the mentally retarded. The court also found a statutory right to habilitation under the Minnesota Hospitalization and Commitment Act.

In addition the court held that civilly committed residents have a due process right to be treated in less restrictive community-based alternatives to institutionalization.

The court agreed with plaintiffs' contention that mentally retarded persons confined in state institutions have a right under the Eighth Amendment or due process clause of the Fourteenth Amendment to a humane and safe living environment including the right to protection from assaults, reasonable access to exercise, and outdoor activities and basic hygienic needs.

Finally, the court noted the possibility of Eighth and Fourteenth Amendment violations arising from the excessive use of seclusion, physical restraint, and tranquilizers.

On October 1, 1974, the court issued findings of fact, conclusions of law, and an order. The court found that Cambridge lacked sufficient direct care staffing for purposes of basic custodial care or for effective habilitation of its residents. The court further found that the excessive and unsupervised use of seclusion at the institution without attempting less onerous means of controlling behavior is cruel and unusual punishment and violates the plaintiffs' right to the least restrictive alternative under the due process clause. The court further found that the use of tranquilizing drugs at the institution was improperly evaluated, monitored and supervised and as such, violated the cruel and unusual punishment and due process clauses of the Constitution.

Extensive relief was ordered. The defendants were ordered to meet Federal intermediate care facility staffing requirements within five months and to also provide certain additional professional staff. This additional staff approximates the levels required by the Accreditation Council for Facilities for the Mentally Retarded.

In addition to the staffing requirements, the court ordered the defendants to provide individualized habilitation plans, extensive alterations in the facility's physical plant, air-conditioning in non-ambulatory units, carpeting in all residential and program areas, removal of bars, limitations on the use of underground tunnels for transporting residents, elimination of seclusion, tight controls and monitoring of physical and chemical restraints, provision of an adaptive wheelchair for all those who need one, and additional equipment and materials for program purposes. Finally, the court required defendants to devise a written plan to provide community placements for all residents at Cambridge who are capable of such placement. The plan is to specifically consider methods by which the severely and profoundly retarded persons can be placed in community facilities that are equivalent or superior to those offered at the state hospital.

On June 27, 1975, plaintiffs were granted leave to file a supplemental complaint.

The supplemental complaint alleges that conditions at Cambridge State Hospital warrant further relief from the court. The Minnesota Commissioners of Administration and Finance are added as defendants. The plaintiffs request the court to: (1) find that conditions at Cambridge State Hospital warrant further relief; (2) declare specifically that shift ratios of 1:4, 1:4, and 1:8 are required; (3) order the defendant Commissioner of Public Welfare to deposit in a special account the federal Medicaid reimbursement funds created by the operation of Cambridge State Hospital and use those funds to finance the court's order; (4) convene a three-judge court; and (5) have this three-judge court enjoin the defendants from enforcing state laws which would prohibit the use of the Medicaid reimbursement funds to finance the order on the

ground that these otherwise valid state fiscal and complement limitations are unconstitutional insofar as they are applied to preclude implementation of the court's constitutionally based order.

Mississippi: Doe v. Hudspeth, No. J 75-36(N) (U.S. D. Ct., S.D. Miss.), filed February 11, 1975.

This Wyatt-type right to treatment case was filed on February 11, 1975, on behalf of residents of the central Mississippi Retardation Center.

This case is in a pre-trial stage.

Missouri: Barnes, et al. v. Robb, et al., C.A. No. 75CU87-C (U.S. D. Ct., W.D., Mo.), filed April 11, 1975.

This is a Wyatt-type class action, seeking injunctive relief, filed on behalf of all persons who are now, or who have been at any time since April 27, 1970, involuntarily confined in the Forensic Unit of State Hospital No. 1, a state facility for the mentally ill and mentally retarded located in Fulton, Missouri.

Plaintiffs also seek monetary damages for violations of the Thirteenth Amendment of the United States Constitution. They allege that they have been forced to perform non-therapeutic labor, without compensation.

The case is in a pre-trial stage.

Montana: United States v. Kellner, Civil Action No. 74-1-138-BU (U.S. D. Ct., Mont.), filed November 8, 1974.

Plaintiff in this Wyatt-type right to treatment case is the United States.

Defendants are various Montana officials responsible for the operation of the Boulder River School and Hospital, a state facility for mentally retarded Montana citizens.

Pretrial discovery is proceeding.

Nebraska: Horacek, et al. v. Exon, et al., Civil Action No. CV72-L-299 Preliminary order, 357 F. Supp. 71 (D. Ct., Neb. 1973).

The plaintiffs in this class action are residents of Beatrice State Home for the Mentally Retarded in Nebraska.

Defendants are Governor James J. Exon, the Director of the State Department of Public Institutions, the Director of Medical Services, the Director of the state Office of Mental Retardation, and the Superintendent of the Beatrice State Home.

This suit is basically modeled on the mental retardation part of the Wyatt suit, with special emphasis on the right to "normalization" and to treatment in less restrictive environments than institutions. The complaint alleges that the community service programs (pioneered by Wolf Wolfensberger and others in the Nebraska area) are the constitutionally required least restrictive alternative for the habilitation of the mentally retarded in Nebraska.

After the complaint was filed in late 1972, defendants filed a motion to dismiss which was modeled along the lines of the motion to dismiss in the Burnham decision.

On March 23, 1973, Chief Judge Warren Urbom issued a memorandum and order denying defendants' motion to dismiss. The court noted that for the purposes of evaluting the defendants' motion to dismiss, the court must determine whether the plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. Taking plaintiffs' allegations as true for the purposes of the motion, the court ruled that plaintiffs had stated at least one claim which is recognized as reviewable under the Civil Rights Act. The allegations that the conditions of confinement at Beatrice State Home are violative of the Eighth Amendment's ban on cruel and unusual punishment were held to fall within the purview of the Civil Rights Act, and the court stated:

> "I cannot say as a matter of law at this stage of the litigation that the plaintiffs will be unable to muster facts in support of their claims that the conditions at the Beatrice State Home are cruel and unusual. At the very least, the plaintiffs should be given an opportunity to offer evidence on this allegation."

One further issue resolved by the court in its memorandum and order of March 23, 1973, is noteworthy. The court observed that parents of certain children residing at the Beatrice State Home had brought this action on behalf of their children. The question had been raised whether the parents of the named plaintiffs were the proper parties to represent the interests of the plaintiffs. As the court held, "I cannot be insensitive to the possibility that the interests of the parents may conflict with those of the children residing at the Beatrice State Home. While the parents in all good conscience may desire one remedy, or specific type of style of treatment for their children, it would not necessarily be in the best interests of the children." For this reason, the court provided for the appointment of a guardian ad litem who would not displace the parents as the representatives of the plaintiffs, but who would be alert to recognize "potential and actual differences in positions asserted by the parents and positions that need to be asserted on behalf of the plaintiffs."

At the same time the court granted the motion to intervene as amicus curiae of the National Center for Law and the Handicapped.

Defendants' motion for leave to file an interlocutory appeal (an appeal on the legal ruling prior to a full evidentiary hearing) of the District Court's order denying their motion to dismiss was denied.

In October 1973, defendants filed a motion for summary judgment in which they raised the following arguments:

--That there is no state action to give rise to rights under the Civil Rights Act (42 U.S.C. 1983) since all the plaintiffs are residents of Beatrice either because of their own voluntary action or because they are poor;

--That even if there is state action, there is no constitutional right to treatment;

--That even if there is a right to treatment, it can only apply to those individuals who have been involuntarily committed to state institutions;

--That while the cruel and unusual punishment provisions of the Eighth Amendment can apply to conditions of confinement, they only apply on behalf of those involuntarily confined;

--That since all of the named plaintiffs have been voluntarily confined, they are not representative of the class of those entitled to a right to treatment or protection from cruel and unusual punishment; and

--That since there are legal remedies, an injunction would not be an appropriate remedy in this case.

The Department of Justice intervened as an amicus curiae (friend of the court) on behalf of the plaintiffs on April 26, 1974.

On June 4, 1974, the District Court denied defendants' motion for summary judgment ruling that the fact that parents voluntarily placed their children in the Beatrice State Home does not deny those children the right to complain of mistreatment nor does it remove the fact of state action.

While the court ruled that the case could proceed as a class action, the Nebraska Association for Retarded Children was dismissed as a plaintifff in that it did not adequately represent the class members.

The case was not tried on the scheduled date in December, 1974, and no new trial date has been set.

New York: New York State Association for Retarded Children v. Carey, 393 F. Supp. 715 (E.D. N.Y. 1975), 357 F. Supp. 752 (E.D. N.Y. 1973).

The final trial on the merits in this case began October 1, 1974, and ended January 6, 1975.

During that time, more than 50 witnesses appeared on the stand and nearly 3,000 pages of court testimony were recorded.

Noted physicians, researchers, professors and parents, all serving as witnesses, told stories of bruised and beaten children, maggot-infested wounds, assembly-line bathing, inadequate medical care, cruel and inappropriate use of restraints, and inadequate clothing.

They testified that children had deteriorated physically, mentally, and emotionally during confinement at the Willowbrook institution.

On April 21, the New York Civil Liberties Union, the Legal Aid Society, the Mental Health Law Project, and the United States Department of Justice announced that the parties to the Willowbrook litigation had reached agreement upon the terms of a consent judgment which would, if approved by the court, resolve the lawsuit. The proposed consent decree -- covering 29 single-spaced pages, and setting forth standards in 23 areas -- was designed to secure the constitutional rights of Willowbrook residents to protection from harm.

Judge Judd approved the proposed consent decree on May 5, 1975, and issued an additional memorandum of his own, along with a formal order ratifying the consent decree. The consent decree sets up duty ratios of direct care staff to residents of one to four during waking hours for the majority of the residents (children, multi-handicapped, and residents requiring intensive psychiatric care). At the time the suits were filed, the ratio of staff to residents was 1-40 and 1-60 in some wards. It also requires an overall ratio of one clinical staff member for every three residents. At least one-third of the clinical staff must be at the professional level. Implementation of the ratios must be accomplished within 13 months.

The decree absolutely forbids seclusion, corporal punishment, degradation, medical experimentation, and the routine use of restraints.

It sets as the primary goal of Willowbrook the preparation of each resident, with regard for individual disabilities and capabilities, for development and life in the community at large.

To this end, the decree mandates individual plans for the education, therapy, care, and development of each resident.

Provisions in the decree require:

*Six scheduled hours of program activity each weekday for all residents.

*Educational programs for residents including provision for the specialized needs of the blind, deaf, and multi-handicapped.

*Well-balanced nutritionally adequate diets.

*Dental services for all.

*No more than eight residents can live or sleep in a unit.

*A minimum of two hours of daily recreational activities -- indoors and out -- and availability of toys, books, and other materials.

*Eyeglasses, hearing aides, wheelchairs, and other adaptive equipment where needed.

*Adequate and appropriate clothing.

*Physicians on duty 24 hours daily for emergency cases.

*A contract with one or more accredited hospitals for acute medical care.

*A full scale immunization program for all residents within three months.

*Compensation for voluntary labor in accordance with applicable minimum wage laws.

*Correction of health and safety hazards including covering radiators and steam pipes to protect residents from injury, repairing broken windows, and removing cockroaches, and other insects and vermin.

The preceding procedures must be accomplished within 13 months.

Under the Willowbrook consent decree, the defendants are further required to:

1. Reduce Willowbrook to 250 beds within six years to serve only people requiring institutional care from Staten Island.

2. Establish within a 12 month period 200 new community placements in hostels, halfway houses, group homes, sheltered workshops, and day care training programs to meet the needs of residents who will be transferred there.

3. Request the State Legislature to provide at least $2,000,000 for financing, leasing, and operating the 200 new community placements.

4. Request the Legislature to provide additional funds to develop and operate community facilities and programs annually for the next five years.

5. Develop an individual plan of care, education, and training for each of Willowbrook's 3,000 residents to prepare them for life in the community.

6. Transfer no residents from Willowbrook unless the Director determines that the new placement will offer better service.

An extremely important feature of the agreement involves the creation of three boards:

1. A seven-member Review Panel with primary responsibility for overseeing the implementation of standards and procedures mandated in the consent decree.

2. A seven-member Consumer Advisory Board comprised of parents and relatives of residents, community leaders, residents, and former residents to evaluate alleged de-humanizing practices and violations of individual and legal rights.

3. A seven-member Professional Advisory Board giving advice on all professional programs and plans, budget requests, and objectives; investigating alleged violations; and assisting in recruitment and training of staff.

The terms of the consent decree apply to the 5,209 persons who were Willowbrook residents when the suits were filed. Thus, the agreement directly applies not only to current Willowbrook residents but also to those residents who have been transferred to other state institutions for the mentally retarded.

In his important memorandum, Judge Judd noted that:

> "During the three-year course of this litigation, the fate of the mentally impaired members of our society has passed from an arcane concern to a major issue both of constitutional rights and social policy. The proposed consent judgment resolving this litigation is partly a fruit of that process."

The memorandum specifically calls attention to that part of the consent decree which recites that:

"The steps, standards and procedures contained in Appendix 'A' hereto are not optimal or ideal standards, nor are they just custodial standards. They are based on the recognition that retarded persons, regardless of the degree of handicapping conditions, are capable of physical, intellectual, emotional and social growth, and upon the further recognition that a certain level of affirmative intervention and programming is necessary if that capacity for growth and development is to be preserved, and regression prevented."

The court's discussion of the applicable constitutional standard justifying relief to the plaintiff class was partially as follows:

"This court's Memorandum and Order of April 10, 1972 found that there was a constitutional right to protection from harm, even in respect of persons whose confinement was not involuntary. The final judgment is couched in those terms, although it provides greater relief than did the preliminary injunction....

"Had this case been finally submitted for determination on the merits, the court would have faced a substantial burden in analyzing the briefs and the mass of testimonial and documentary evidence which was submitted by both sides and which bears on the right to relief and the formulation of the various categories of relief. Happily, the parties have relieved the court of this task and have brought to bear on the forging of relief their evident expertise. The court has reviewed the proposed judgment and each of the Steps, Standards and Procedures, and finds them neither impractical, improper nor beyond the scope of the complaint.

* * *

"The consent judgment reflects the fact that protection from harm requires relief more extensive than this court originally contemplated, because harm can result not only from neglect but from conditions which cause regression or which prevent development of an individual's capabilities."

Going on to observe that in the interval since the court's preliminary injunction giving important but limited relief on "protection from harm" grounds, there "have been significant judicial decisions in the field" (citing Donaldson v. O'Connor, Wyatt v. Aderholt, and Welsch v. Likins) the court further noted that:

"Somewhat different legal rubrics have been employed in these cases -- 'protection from harm' in this case and 'right to treatment' and 'need for care' in others. It appears that

there is no bright line separating these standards. In the present posture of this case, there is no need for the court to re-examine the constitutional standard properly applicable to Willowbrook's residents. The relief which the parties agreed to will advance the very rights enunciated in the case law since this court's 1973 ruling."

In addition to the named parties and the U.S. Department of Justice, which played a major role, other groups which participated in the case as amicus curiae include: American Association on Mental Deficiency; New York Chapter of the National Association of Social Workers; Federation of Parents Organizations for New York State Mental Institutions; and New York State Federation of Chapters of the Council of Exceptional Children.

Ohio: Davis v. Watkins, 384 F. Supp. 1196 (U.S. D. Ct., N.D., Ohio 1974).

Plaintiffs in this Wyatt-type class action right to treatment suit were residents of the Lima State Hospital. Defendants were the officials responsible for the administration of the hospital.

The court, relying on Wyatt, granted summary judgment to plaintiffs and ordered the following relief:

1. Evaluation of all persons confined in the institution, by virtue of either civil or criminal proceedings, to determine whether they are mentally ill or retarded and in need of continuing commitment.

2. Provision of minimum constitutional standards for treatment, including placement in the least restrictive alternative setting; development of individual treatment plans; treatment of patients in a "humane" psychological and physical environment; patient rights; care of patients' personal possessions; adequate diet and food services; and adequate physical facilities.

The court ordered the appointment of a Special Master to govern implementation of these standards.

Pennsylvania: Halderman v. Penhurst State School and Hospital, No. 74-1345 (U.S. D. Ct., E.D., Pa.), filed May 30, 1974.

Plaintiffs in this class action suit are residents of state institutions for the retarded in Pennsylvania.

Defendants are officials of the Pennhurst institution and of the Department of Public Welfare.

Plaintiffs claim that they have been denied their right to treatment, right to refuse treatment and right to treatment in the least restrictive alternative. Plaintiffs also claim deterioration in their mental

condition and physical harm due to mistreatment by employees of the institution.

Plaintiffs seek declaratory and injunctive relief as well as compensatory and punitive damages.

Defendants have filed a motion to dismiss, and the parties are now in the midst of a briefing schedule on that motion.

The United States was granted leave to intervene as a party plaintiff, and the Pennsylvania Association for Retarded Children has filed a motion to intervene as a party plaintiff.

Pennsylvania: Waller v. Catholic Social Services, No. 74-1766 (U.S. D. Ct., E.D., Pa.), filed July 12, 1974.

Plaintiff in this suit was a mentally retarded resident of a state institution. Defendants were the administrators of the institution.

Plaintiff claimed that she was denied the right to treatment in the least restrictive appropriate facility in that, despite repeated recommendations from the hospital staff, defendants failed to place her in a group home.

Plaintiff sought an order compelling the defendants to place her in a group home and damages for the harm she suffered by not being so placed.

As a result of negotiations, defendants placed plaintiff in a group home, and she then voluntarily dismissed her lawsuit.

Tennessee: Saville v. Treadway, Civil Action No. Nashville 6969 (U.S. D. Ct., M.D., Tenn.) Decided March 8, 1974. Consent Decree, September 18, 1974.

This Wyatt-type class action was filed on April 10, 1973, on behalf of the mentally retarded citizens residing at Clover Bottom Developmental Center, Donelson, Tennessee.

In addition to the right to treatment claims, the suit also challenged the constitutionality of certain state statutes which permitted the commitment of a person to a state mental hospital merely upon the request of a parent or guardian and the consent of the hospital superintendent.

On March 8, 1974, the three-judge District Court held that the challenged commitment statutes violated the due process clause of the United States Constitution because they lacked procedural safeguards to protect the interest of the child. The court enjoined the state from making further commitments under the challenged statutory provisions.

On September 18, 1974, a district court entered a consent decree which provided:

> "The parties are now desirous of an amicable settlement of the remaining portion of the lawsuit and have reached the following understanding without waiving any claims or defenses heretofore asserted by them. The Defendants agree that in the past some residents of Clover Bottom Developmental Center have not been provided opportunities for habilitative services currently considered appropriate. Defendants further agree that at present possibly fifty percent (50%) of Clover Bottom Developmental Center residents are being institutionalized in an environment more restrictive to their liberty than is necessary if other appropriate alternatives existed. Plaintiffs are presently convinced of the good intentions of the named Defendants in ensuring that the rights of all mentally retarded citizens are protected and that all resources being made available to the Defendants are being used to ensure that community alternative facilities are created in order to decrease the resident population of Clover Bottom Developmental Center, and that proper services are made available to the mentally retarded residents of Clover Bottom Developmental Center.
>
> "The parties are further agreed that mentally retarded persons admitted to Clover Bottom Developmental Center have a right to proper medical care and physical restoration and to such education, training, habilitation and guidance as will enable them to develop their individual ability and potential to the fullest possible extent, no matter how severe the degree of disability; and that such persons have a right to an environment least restrictive to their liberty in that individual freedom is to be restricted to no greater extent than is necessary and appropriate to provide habilitative services.
>
> "It is therefored ORDERED, by agreement, that:
>
> (1) It is declared that mentally retarded citizens admitted to Clover Bottom Developmental Center have a right to habilitative services as defined in the above agreement.
>
> (2) It is further declared that such mentally retarded citizens have a right to receive habilitative services in the least restrictive alternative.
>
> (3) The Defendants will, within four (4) months from the date of entry of this Order, submit to the Court a plan to implement the rights declared in paragraph (1) and paragraph (2) of this Order.
>
> "It is further ORDERED, by agreement, that this case be and the same hereby is dismissed in its entirety, with prejudice, except

that within eight (8) months of the date on which the Defendants file the plan referred to in paragraph (3) above, the Plaintiffs may move the Court to reset the case or the Court on its own motion may reset the case solely upon the issue of the adequacy of said plan. If no such motion is filed within said period of time, then this case shall stand dismissed, with prejudice, as to the issue of the adequacy of said plan also."

Washington: Boulton v. Morris, No. 781659 (Superior Ct., King County, Wash.), filed June, 1974.

Plaintiffs in this class action represent all residents of the Rainier School, a Washington institution for the mentally retarded.

Defendants are various officials responsible for operation of the Rainier School.

Plaintiffs seek an injunction requiring the Department of Social and Health Services to increase the institution's professional and custodial staff, in order to provide the same ratio of staff to residents and the same level of care and habilitation that is provided at other institutions of the same kind operated by the department. Plaintiffs allege that as a result of understaffing they are being discriminated against, in violation of the equal protection clause of the U.S. Constitution, and that they are being denied the right to treatment in violation of the due process clause of the U.S. Constitution, as well as the Constitution and statutes of the state of Washington.

The case is in a pre-trial stage.

Washington: Preston v. Morris, No. 77-9700 (Superior Ct., King County, Wash.), filed April 23, 1974.

Plaintiffs are mentally retarded persons with problems of sexual deviancy who are confined in state facilities for the retarded in Washington.

Defendants are the state officials responsible for the operation of facilities and programs for the retarded in the state of Washington.

Plaintiffs claim that defendants, in violation of both state law and the equal protection clause of the Fourteenth Amendment to the United States Constitution, are failing to provide them with treatment equal to the treatment provided intellectually normal persons exhibiting the same sexually deviant behavior.

Plaintiffs seek injunctive relief to provide them with adequate treatment for their problems.

A group of psychologists and psychiatrists are presently writing a proposed treatment plan at the request of plaintiffs. A similar group of experts is also working on such a plan at the request of the defendants.

Washington: White v. Morris, Civil Action No. 789666 (Superior Ct., King County, Wash.). Decided November 15, 1974.

Finding that a mentally retarded offender who is subject to the correctional system of the state has a right to treatment, the court ordered the state to pay for the costs of a private residential program for his care, custody, treatment, reformation, correction, and habilitation.

The Department of Social and Health Services refused to comply with that portion of the court's order which required payment of costs at a private residential facility. A civil action for writ of mandate is now awaiting decision after trial.

K. VOTING

New Jersey: Carroll, et al. v. Cobb, et al. Civil Action No. L-6585-74-P.W. (Superior Court, N.J.), decided November, 1974.

Plaintiffs in this class action were thirty-three adult residents of the New Lisbon State School, a school for the mentally retarded maintained by the state of New Jersey, located in Woodland Township, Burlington County, New Jersey.

Defendants were the Clerk of Woodland Township and the Burlington County Board of Elections.

Plaintiffs claimed that they were being denied their right to vote, in violation of the Constitution and statutes of both the United States and New Jersey, simply because of their status as residents of the New Lisbon State School, and despite the fact that each member of the class had been determined to be competent by qualified representatives of the Department of Institutions and Agencies.

Plaintiffs sought declaratory and injunctive relief to compel the defendants to immediately register all members of the class and to permit them to vote in the November 5, 1974, election.

On October 29, 1974, the court ruled both that the plaintiffs were residents of Woodland Township for the purposes of voting and that the refusal of the Clerk of Woodland Township and Burlington County Board of Elections to register the plaintiffs was unlawful.

Subsequent to the court's order, plaintiffs registered to vote, and many voted in the November 5, 1974, election.

Both defendants have appealed the court's decision.

L. ZONING

California: Defoe v. San Francisco Planning Commission, Civ. No. 30789 (Superior Ct., Calif.).

This class action, brought on August 17, 1970, was filed by two mentally retarded children in need of foster home care and by persons licensed by the California Department of Mental Hygiene to provide home care for such children. The suit was commenced in the Superior Court for the City and County of San Franciso.

The defendants in the suit were the San Francisco City Planning Commission, its individual members, the Department of City Planning of the City of San Francisco, and the Zoning Administrator for the City of San Francisco.

The adult plaintiffs alleged that they lived in areas of San Francisco zoned single-family residential and that they had applied to the state Department of Mental Hygiene for family-home licenses authorizing them to provide home care for in excess of two but not more than six mentally retarded children. The Department of Mental Hygiene determined that each of these plaintiffs met all legal requirements to receive such licenses. Plaintiffs were each licensed to care for only two children, however, because the Zoning Administrator of the Department of City Planning of the City of San Francisco refused to grant zoning clearance for the boarding of more than two mentally retarded children in areas zoned single-family residential.

The two mentally retarded plaintiffs alleged an interest in the action because, in view of the Zoning Administrator's rulings, their mother had been unable to find any licensed family home in San Francisco where they could be boarded and had been forced to accept placements for them in two separately licensed family homes in Sonoma County, over 100 miles away.

All plaintiffs alleged that defendants' restrictive interpretation of the City Planning Code constituted an invalid exercise of the police power and was in direct conflict with state laws regulating the placement, supervision, and care of mentally retarded children; and further, that defendants were invidiously discriminating against the mentally retarded. Under these circumstances, plaintiffs sought (1) a writ of mandamus commanding respondents to grant written zoning clearance permitting the placement of six mentally retarded children in the homes of adult plaintiffs, and (2) a judicial construction of the applicable provisions of the City Planning Code and a judgment declaring that defendants' restrictive interpretation of such provisions was unconstitutional.

At the initial hearing on the petition on September 17, 1970, plaintiffs submitted that defendants had created a crisis situation in which re-

tarded children from San Francisco were being deprived of the opportunity to receive home care there, although numerous persons stood ready and legally able to provide such services. While the defendants conceded that home care of retarded children was not mentioned in the San Francisco City Planning Code, they justified the prohibition of such a use on the grounds that it required "medical supervision" and that more than two unrelated retarded children living together under supervision could not be considered part of a "family," within the meaning of the law. Plaintiffs submited numerous affidavits and authenticated statements of mental retardation experts. This evidence was intended to establish the importance of community placement in group homes close to the natural family for medical and developmental reasons, as well as the relative economy to the state of providing community rather than institutional care. Evidence was also presented that, because of defendants' restrictive zoning policy, many hundreds of retarded children were unable to obtain placement in group homes and were forced to remain in isolated and overcrowded institutions unsuited to their needs.

On September 25, 1970, the trial court denied plaintiffs a preemptory writ of mandamus. Thereafter, on November 16, 1970, plaintiffs filed in Superior Court a motion to vacate and set aside the trial court's order and to grant the petition on the basis of the enactment of new and highly relevant legislation nine days prior to the denial of the petition. This motion was denied on December 24, 1970, whereupon plaintiffs filed notice of appeal.

After the parties had filed briefs, an important amendment to state legislation was passed providing that family homes for the care of six or fewer mentally retarded persons "shall be a permitted use in all residential zones, including, but not limited to, residential zones for single-family dwellings....[N]o conditions shall be imposed on such homes which are more restrictive than those imposed on other similar dwellings in the same zones unless such additonal conditions are necessary to protect the health and safety of the residents." Defendants had never imposed any restriction on the home care of retarded children, so this legislation left no doubt as to the intent of the state.

A second amendment was passed eliminating the requirement that an applicant for a license to operate a family home demonstrate that he had written zoning clearance or other satisfactory evidence of proper zoning.

On May 30, 1973, the Court of Appeals for the State of California noted the changes in relevant state law and therefore remanded the case to the trial court for reconsideration. The court further stated in its opinion that "it may well be that the Amendments [in state law]...have eliminated any controversy between the parties as well as any need for injunctive relief."

On June 26, 1973, plaintiffs filed a Petition for a Rehearing requesting that the decision of the Court of Appeals be reconsidered. Plaintiffs submitted that a decision on the merits by the Court of Appeals would (1) avoid the likelihood of widespread litigation on the same issue in other state Superior Courts, and (2) permit final disposition of the case and prevent delay in transferring mentally retarded children from state institutions to local care facilities.

Plaintiffs' petiton for rehearing filed with the Court of Appeals was denied.

During the argument at the Court of Appeals, plaintiffs and defendants appeared to agree that the state law relating to zoning of group homes preempted local ordinances. Nevertheless, plaintiffs filed a motion for summary judgment in the Superior Court on this issue.

The motion was denied on the grounds that there was no true controversy since the local law was no longer actively enforced.

Michigan: Doe v. Damm, Complaint No. 627 (U.S. D. Ct., E.D., Mich.), filed March 8, 1973.

This action was filed on March 8, 1973, by the special guardians of six mentally retarded wards, involuntarily committed to Lapeer State Home and Training School, whose placement in a group home in the community was considered an integral part of their habilitation programs. Defendants were forty homeowners and residents near the proposed site of such a group home, the city mayor, and councilman, and the city manager.

Plaintiff wards had been screened, processed, recommended, and were ready to be placed in a home zoned by defendant city as a two-family dwelling. The home, under lease by the County Association of Retarded Children, had been renovated, and defendant city had approved it as conforming to all applicable state and local codes governing construction and usages and zoning for a group residence.

Plaintiffs alleged that defendants acted under color of law to deprive plaintiffs of their constitutional rights. Plaintiffs also claimed that defendants instituted a law suit from which an order was obtained restraining the proposed occupancy of the group home without a resolution authorizing such law suit from the city Council. Furthermore, plaintiffs alleged that their wards remained confined in a mental institution without benefit of living in as nearly a normalized environment as possible and that permanent damage might result.

Plaintiffs sought an injunction restraining defendants from obstruction of the establishment of the group home and damages in the amount of $200,000 for each ward.

The action ended in a non-suit after an agreement was reached whereby the group home would be granted a variance. All six plaintiff wards were placed in a group home outside the institution.

Minnesota: Anderson v. City of Shoreview, No. 401575 (D. Ct., Second Judicial District, Minn.). Decided June 24, 1975.

On July 15, 1974, the City of Shoreview granted a special use permit for the construction of institutional housing, consisting of three units for the mentally retarded.

Plaintiffs, principally persons residing in the neighborhood and owners of homes in the neighborhood, sought to enjoin any action authorized by the special use permit. Plaintiffs alleged that the grant of the special use permit was "arbitrary, capricious, unreasonable, illegal, unauthorized, discriminatory, involuntary, unconstitutional, and void." Plaintiffs further alleged that the special use permit would "seriously harm the health, safety and public welfare of the City of Shoreview and the plaintiffs and [would] constitute a nuisance."

The court held that the City Council properly granted the special use permit. In so holding, the court noted:

> "That the policy of the State of Minnesota expressed by the Legislature is that mentally retarded persons should not be excluded by municipal zoning ordinances from the benefits of normal residential surroundings."

New York: Village of Belle Terre v. Borass, 91 S.Ct. 1536 (1974).

While this case does not involve the mentally retarded per se, its impact on the question of exclusionary zoning is significant.

Appellant in this case was the Village of Belle Terre, New York.

Appellees were three unmarried college students and their landlord.

Under the zoning ordinance in Belle Terre, certain areas were restricted to one-family dwellings. "Family" was defined as "One or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons, but not exceeding two (2), living and cooking together as a single housekeeping unit, though not related by blood, adoption or marriage shall be deemed to constitute a family."

Appellee students had leased a house in a one-family zone. When the Village sought to evict them they brought this suit to have the definition of family declared unconstitutional. The District Court and Second Circuit Court of Appeals held that the definition violated the equal

protection clause of the Fourteenth Amendment. The Supreme Court, per Justice Douglas, reversed (6-3).

The majority opinion held that such a restriction was a a valid exercise of the police power and let the provision stand. Justice Marshall, dissenting, objected that the provision in question discriminated on the basis of lifestyle, a fundamental personal right, and therefore that the state should have to show a substantial and compelling interest.

Ohio: Boyd v. Gateways to Better Living, Inc., Case No. 73-CI-531 (Mahoning County Court of Common Pleas), filed April 18, 1973.

A complaint was filed on April 18, 1973, by a group of Youngstown, Ohio, taxpayers against defendants Gateways to Better Living, Inc., a non-profit corporation, and the Mahoning County Commissioners, to whom a residence had been donated. The Commissioners intended to renovate the residence for use as a group home for the mentally retarded.

Originally, the City of Youngstown, Ohio, had refused to grant a building permit to the defendants on the grounds that the use of the residence would be in violation of the zoning ordinance restricting more than five unrelated persons from living in a dwelling in certain areas. Ultimately, they did receive the building permit, and plaintiffs sought an injunction to halt construction on the residence and to prevent the establishment of a group home on the premises.

Defendants filed a general answer alleging that the property owned by the defendant county commissioners was exempt from zoning restrictions imposed by a different political entity. They also raised a preemption argument based on relevant state law and policy. Finally, they made a constitutional argument that the application of the zoning ordinance in such a restrictive manner would constitute a deprivation of First and Fourteenth Amendment rights.

Following a trial, the court rendered judgment in favor of the group home operator. That decision was not appealed and is therefore final.

Ohio: Driscoll v. Goldberg, Case No. 72-C1-1248 (Mahoning County Ct. of Common Pleas, Ohio), 73 C.A. 59 (Ohio Court of Appeals, 7th District). Decided April 9, 1974.

A complaint was filed on August 15, 1972, in the Court of Common Pleas by a group of Youngstown, Ohio, property owners seeking to prevent the establishment of a group home for mentally retarded children in a neighboring residence. Defendant in the suit was the property owner who had entered into a purchase agreement with Gateways to Better Living, Inc., a non-profit corporation which contracts to provide community services to the mentally retarded.

Plaintiffs alleged that a group home comprised of mentally retarded children and two house parents would be in violation of the local zoning

ordinance restricting the use of that residential area to single-family dwellings. They sought an injunction prohibiting the sale and use of the dwelling for a group home for the mentally retarded.

Defendant submitted that the establishment of a group home for the mentally retarded would be in full compliance with the zoning ordinance. He argued that the correct interpretation of "family" for purposes of the "single-family dwelling" requirement in the ordinance was a "single housekeeping unit."

In an opinion dated August 30, 1973, the court found that a group home for mentally retarded children was a "single family residence" within the meaning of the zoning ordinance and therefore was a permitted use.

Plaintiffs appealed the trial court decision.

The Court of Appeals, affirming the trial court decision, ruled that since zoning ordinances are in "derogation of the common law" they should be strictly construed. The zoning ordinance defines a "family" as a group of people living as a "single housekeeping unit." Since the trial court found as a fact that the group home would be operated much like a traditional family and that it would function as a single housekeeping unit as opposed to a boarding house or fraternity house, the Court of Appeals ruled that the group home would come within the definition of family used in the zoning ordinance and would therefore be a permitted use under Ohio law.

No appeal was taken to the state Supreme Court. The decision of the Court of Appeals is therefore final.

Wisconsin: Browndale International, Ltd. v. Board of Adjustment, 60 Wis. 2d 182, 208 N.W.2d 121 (Wis. 1973), cert. denied, 94 S. Ct. 1933 (1974).

Browndale International, Ltd. entered into contracts of sale for the purchase of six homes in Dane County for use as group homes for emotionally disturbed children. The contracts of sale had a contingency, namely that zoning authority had to be secured before the contracts would be binding. The Dane County Zoning Administrator indicated that the uses were permitted under the Dane County zoning ordinance. This interpretation was challenged and brought before the Dane County Board of Adjustment. The County Board interpreted the zoning ordinance as requiring approval of each site which Browndale was going to utilize before it could operate. This decision was appealed to the County Circuit Court.

The decision of the County Circuit Court that the homes were permitted uses which did not require site-by-site approval was overturned by the Wisconsin Supreme Court.

Plaintiff petitioned the United States Supreme Court for certiorari, but the petition was denied on April 15, 1974.

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